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Thomas R. Haggard

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UNION CHECKOFF ARRANGEMENTS UNDER THE NATIONAL LABOR RELATIONS ACT

Thomas R. Haggard*

I. INTRODUCTION, BACKGROUND, AND OVERVIEW

The object of union security provisions in labor contracts is to guarantee, at a minimum, each employee's financial support of the union. One method of implementing this support is to have the employer deduct dues and fees from the employee's wages and remit them to the union. Thus, in industrial relations, the "[c]heckoff is a means by which employees voluntarily assign a portion of their wages to a union in order to pay their dues and other obligations to the union."¹

Although the concept appears to be relatively simple, checkoff arrangements have presented a number of quite complex legal issues to the National Labor Relations Board (the "Board") and the courts. This Article examines how those issues have been resolved under the National Labor Relations Act, as amended ("NLRA" or "Act"),² and the Labor Management Relations (Taft Hartley) Act.³ Issues concerning checkoff arrangements can arise under three different statutory sections. Section 302 of the Taft-Hartley Act, discussed in Part II, prohibits checkoff arrangements unless they meet certain requirements, and provides for civil and criminal sanctions against those that do not. Second, although section 8 of the NLRA does not mention checkoffs expressly, its unfair labor practice provisions impact on these arrangements in a number of ways, as discussed in detail in Part III. Third, the Article discusses in Part IV, whether the Board, in resolving the statutory issues, should defer to an arbitral resolution of related contract issues. Lastly, section 14(b) of the Taft-Hartley Act authorizes the states to prohibit compulsory union membership within their borders, raising an issue of whether the states may also regulate checkoff arrangements, as discussed in Part V.

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1. *Frito-Lay, Inc.*, 243 N.L.R.B. 137, 137 (1979). See also *The Check-Off in Collective Agreements*, 30 MONTHLY LAB. REV. 1 (1930) ("the checkoff is an arrangement under which the employer agrees to deduct from the wages due each union employee who signs a written authorization, the amounts that may be due from month to month from such employee to the union for regular dues, special assessments or fees," and employer pays over to union the aggregate amount collected from employees).

2. 29 U.S.C. §§ 141-187 (1982).

3. 63 Stat. 136 (1947), as amended 29 U.S.C. §§ 141-197 (1982).

A. Checkoff Arrangements and Union Security

"Union security," or "compulsory unionism," refers to a situation where, by virtue of a contract between an employer and a union, employees are required to be "members" of the union as a condition of continued employment.⁴ Under the Act, however, the most stringent form of membership which may be required is the payment of a service fee equal to dues and initiation fees.⁵ It does not encompass an actual or formal affiliation with

4. T. HAGGARD, *COMPULSORY UNIONISM, THE NLRB, AND THE COURTS* 4 (1977) (discussion of the four types of union security provisions). Under federal law, the term "membership" merely connotes the payment of each employee's pro rata share of the cost of union representation. *Communications Workers v. Beck*, 108 S. Ct. 2641, 2648 (1988), *infra* notes 5-6 and accompanying text. A "closed shop" is one in which a prospective employee must become an actual member of the union before being hired. A "union" shop is one in which the employee must join the union within a certain time after being hired. An "agency shop" is one in which employees are not required to actually belong to the union as members, but must nonetheless pay the equivalent of dues and fees. Fourth is the "maintenance of membership" provision, which "imposes no obligation to join a union but merely an obligation to remain a member once having voluntarily become one." R. GORMAN, *BASIC TEXT ON LABOR LAW* 642 (1976); *see also id.* at 639-46 (discussing and comparing these types of union security devices). The National Labor Relations Act originally permitted employers and unions to negotiate closed shop provisions. *Id.* at 640. The Taft-Hartley Act added two provisos to the section which became section 8(a)(3). 29 U.S.C. § 185(a)(3) (1982). The first prevents employer discrimination on the basis of nonmembership, except where the union does not make membership available to all employees on equal terms. The second proviso allows the employer to discriminate on the basis of membership only to the extent that the employee failed to pay the union dues and initiation fees. Section 8(a)(3) provides in pertinent part:

It shall be an unfair labor practice for an employer—

...
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective day of such agreement, whichever is later, . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

29 U.S.C. § 158(a)(3) (1982) (emphasis in original). The Supreme Court has construed the "membership" required under section 8(a)(3) to be limited to the obligations imposed by an agency shop provision. *See infra* note 5 and accompanying text. For a detailed discussion of the history of union security provisions under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982) [hereinafter RLA], see *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

5. *Communications Workers v. Beck*, 108 S. Ct. 2641, 2648 (1988) ("the 'membership' that may be . . . required has been 'whittled down to its financial core.'" (quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1966))); *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 (1963) (nonmembers required to pay "service fee [which] is admittedly the exact equal of membership initiation fees and monthly dues").

the union, in the sense of joining it as a private association. Furthermore, even the financial aspects of the obligation are limited to covering costs incurred by the union in the discharge of its statutorily-imposed duties as exclusive representative of employees for collective bargaining purposes.⁶

Checkoff arrangements fit easily within the union security concept. Both compulsory "membership" and checkoff arrangements serve exactly the same purpose, that of providing the union with the security of knowing that the "members" it represents will continue to provide the necessary monetary support for a fixed period.⁷ One difference between the checkoff and agency-fee arrangements, the most stringent form of union security agreement allowed by federal law, is that under the latter the employee has no option but to support the union financially, while the checkoff is an arrangement which the employee can initially enter into only voluntarily. However, the "maintenance-of-membership" form of union security, where an employee who is or becomes a "member" is required to remain one,⁸ also involves an initial voluntary choice by the employee. There is thus no real difference between the checkoff and the more traditional forms of union security.

When Congress passed the Taft-Hartley Act in 1947, it likewise recognized that the checkoff "is a form of 'union security' that is in effect in many plants."⁹ Commentators evaluating the changes which the Taft-Hartley Act

6. *Communications Workers*, 108 S. Ct. at 2648 (stating that the compulsory union membership that is allowed by the statute does not include an "obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment").

7. See, e.g., *ITT Henze Valve Service, Controls and Instruments Div.*, 166 N.L.R.B. 592, 597 (1967) (noting that one of the objectives of a checkoff arrangement is "that of achieving a degree of stability of membership in the plant"); Note, *Employer's Liability Under Checkoff Contract For Non-Union Employee's Dues*, 47 COLUM. L. REV. 143, 145 (1947) ("where judicial resistance to the closed shop itself is strong, unions have written in checkoff provisions, thus securing at least universal financial support"); Note, *Checkoff Of Union Dues Under the NLRA—A Federally Protected Bargaining Issue*, 26 IND. L.J. 443, 447 (1951) ("The principal merit to a check-off plan arises from the stability of finance and membership which it affords to the union.").

8. See generally T. HAGGARD, *supra* note 4, at 4. Under a maintenance-of-membership arrangement, the employee is locked-in for the duration of the collective bargaining agreement, usually three years. Under a checkoff arrangement that period is limited to a year. Another difference relates to the method of "enforcement." The traditional forms of union security are "enforced" by terminating the employee who refuses to maintain the required membership (e.g. pay dues), while the checkoff is "enforced" by simply deducting the money from the employee's paycheck. In both situations, however, union membership is literally made a "condition" of continued employment.

9. HOUSE COMM. ON EDUCATION AND LABOR, LABOR-MANAGEMENT RELATIONS ACT, 1947, H.R. REP. NO. 245, 80th Cong., 1st Sess. 29, reprinted in LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 292, 320 (1959) [hereinafter LEGIS. HIST.]. This statement was made in reference to the original House version of the Taft-Hartley Act which dealt with checkoffs in the unfair labor practice section of the statute and which permitted them only if the employee's authorization was revocable upon 30-days notice. H.R. 3020, 80th Cong., 1st Sess. § 8(a)(2), at 20-21, reprinted in LEGIS. HIST., *supra*, at 177-78.

made in the NLRA have also recognized the obvious fact that the checkoff is directly related to union security provisions in labor agreements.¹⁰

Nevertheless, the prevailing view is that "[t]he checkoff provision is not a union security device; it is simply an administrative convenience for the collection of dues."¹¹ This mistaken view of the concepts underlying checkoff arrangements as well as of their character involves more than a mere semantic quibble. To the contrary, it has tended to prevent the Board and the courts from creating a coherent body of law on the checkoff that draws its essence from the statutory provisions and policies generally limiting compulsory union membership. Until the close relationship between checkoff arrangements and the more traditional forms of union security is recognized, there is a serious danger that the law in the former area will operate to frustrate the purposes of the law in the latter.

B. Nature of the Legal Relationship

The Board has characterized the checkoff in conflicting ways, sometimes in the same breath. In one case, for example, it said that "a dues-checkoff authorization, or *wage assignment* as it is called in this case, is a *contract* between an employee and his employer."¹² There is, of course, a radical difference between a "wage assignment" and a "contract."¹³

The current emphasis is on the checkoff's allegedly contractual nature.¹⁴ This is a questionable way in which to characterize the legal relationship

10. McNatt, *Check-Off*, 4 LAB. L.J. 123, 123 (1953) ("[t]he check-off is simply another form of union security provision and is therefore closely related to various union shop provisions in collective bargaining contracts").

11. *Anheuser-Busch, Inc. v. International Bhd. of Teamsters, Local 822*, 584 F.2d 41, 43 (4th Cir. 1978). See also *NLRB v. Atlanta Printing Specialties & Paper Prods. Union* 527, 523 F.2d 783, 786 (5th Cir. 1975) (checkoff is not a union security device because an employee could revoke authorization and yet continue to pay dues personally).

12. *Local Lodge 2045, IAM (Eagle Signal Indus. Controls)*, 268 N.L.R.B. 635, 637 (1984) (emphasis added).

13. See E. FARNSWORTH, *CONTRACTS* 776 (1982) ("It is important to remember that an assignment is a transfer, not a contract (promise), and to understand that whether a *transferee* has given *value* is not the same question as whether a *promisee* has given *consideration*.").

14. It is not clear where this notion came from. The Fifth Circuit first gave it that characterization in 1975, without explanation. See *NLRB v. Atlanta Printing Specialties Union, Local 527*, 523 F.2d 783, 785 (5th Cir. 1975). The Board later reached the same conclusion, and purported to base this on the literal wording of section 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(4) (1982). See *Cameron Iron Works, Inc.*, 235 N.L.R.B. 287, 289 (1978) (union and employer could not change terms of checkoff authorization, as a contract between employer and employee, by their subsequent agreement without obtaining employee's signature on new authorization), *enforcement denied*, 591 F.2d 1 (5th Cir. 1979). However, that section nowhere refers to the checkoff as a "contract." Indeed, the statute expressly uses the word "assignment." In *San Diego County District Council of Carpenters (Campbell Indus.)*, 243 N.L.R.B. 147, 149 (1979), the Board ruled that continued deduction of dues for those who had resigned their union membership violated section 8(b)(1)(A) of the Act because resignation revoked checkoff authorization by operation of law. The Board apparently relied on the wording

that a checkoff authorization establishes between an employer and an employee. The typical authorization card contains no words of promise by either party.¹⁵ The employer, who does not even sign the document, certainly does not expressly promise to do anything.¹⁶ Even from the employee's perspective, a signed checkoff authorization is not merely promissory. Rather, it is an executed transaction consisting of the actual transfer to the union of the employee's right to receive wage money from the employer. One might argue that authorization language purporting to make the checkoff irrevocable is an implied promise by the employee not to revoke the authorization. If so, it still must be supported by consideration before it can form the basis of a contract.

The purported consideration, however, that is often cited in support of this alleged contract does not withstand close scrutiny. In the first place, the "benefits of union membership," however they are defined, clearly do not flow from the employer, as one court seemed to assume.¹⁷ On the other hand, while the consideration that supports a promise may flow from someone other than the promisee, a union gives no additional benefits in exchange for a checkoff authorization. The benefit of representation flows directly from the provisions of the Act.¹⁸ Furthermore, the additional benefits

of the checkoff authorization itself, which was given "in consideration of the benefits received and to be received by me as a result of my membership in the Union." Because "consideration" is a contract concept, the Board apparently concluded that the authorization must necessarily be a contract. *Id.* at 149 n.9 ("parties agreed to checkoff on express understanding that union membership with its attendant benefits furnished consideration therefore").

15. Although the wording varies, the operative legal words in most checkoff authorizations are "authorize" and "assign." See, e.g., *Industrial Towel & Uniform Serv.*, 195 N.L.R.B. 1121, 1125 (1972) (reproducing "Check-off Authorization and Assignment" form), *enforcement denied*, 473 F.2d 1258 (6th Cir. 1973).

16. Whatever contractual duty the employer has to checkoff and transmit dues to the union arises out the collective bargaining agreement between the employer and the union, not the checkoff authorization. For a typical collective bargaining agreement checkoff provision, see *Industrial Towel*, 195 N.L.R.B. at 1124. Alternatively, the employer's duty to transmit the money derives from the contract of employment with the employee, who has transferred to the union the right to receive a portion of the wages that are due. That, however, does not turn the checkoff authorization itself into a contract.

17. *NLRB v. United States Postal Serv.*, 827 F.2d 548 (9th Cir. 1987) (holding that since the employer did not stop providing the benefits of union membership, the employee could not unilaterally terminate the contract). The court stated, "[a]lthough the [checkoff authorization] contract did not explicitly state that the employee's authorization was conditioned on the employer's performance or tendering of performance, such 'constructive conditions of exchange' are freely implied." *Id.* at 554 (emphasis added) (citing E. FARNSWORTH, *CONTRACTS* 579-80 (1982)).

18. The union's statutory duty to represent *everyone* in the bargaining unit, regardless of union membership, is known as the "duty of fair representation." *Vaca v. Sipes*, 386 U.S. 171 (1967). A union's failure to represent an employee who refused to sign a checkoff authorization would undoubtedly constitute a breach of that duty of fair representation. In addition, since the law requires that a checkoff be entirely voluntary, it would also be an unfair labor practice for the union to even attempt to induce employees into signing a checkoff authorization by

of formal membership flow from the membership contract between the individual and the union,¹⁹ not from the fact that the employee has executed a partial wage assignment. Finally, while one might argue that the employee's implied promise not to revoke creates a unilateral contract that is accepted by the employer's beginning of performance (forwarding the money to the union, which also provides the consideration), this is stretching unilateral contract theory fairly thin.²⁰

Moreover, these doctrinal contortions are unnecessary because the alternative of characterizing the authorization as an assignment is so apt. A checkoff authorization is exactly what it purports to be—a partial assignment of the employee's contractual right to receive wages for work done.²¹ The House minority report on the Taft-Hartley Act states that "[t]he check-off is in the nature of a legal assignment of wages to a creditor."²² It is a present transfer of a future right under an existing contract.²³ Like any other assignment, it may be subject to both express and implied conditions.²⁴

providing them with additional benefits. *Cf.* Building Material & Dump Truck Drivers, Local 420 (Gregg Indus.), 274 N.L.R.B. 603 (1985) (holding that a union illegally restrains and coerces employees when it uses economic inducements as a means of obtaining employee signatures on cards authorizing union as exclusive bargaining representative). In sum, the law virtually precludes the existence of any union-based additional consideration that could be given in exchange for a checkoff.

19. Union membership is generally conceptualized in terms of a contract. *See, e.g.,* International Ass'n. of Machinists v. Gonzales, 356 U.S. 617, 618 (1958) ("[The] contractual conception of the relation between a member and his union widely prevails in this country.').

20. *See generally* J. MURRAY, MURRAY ON CONTRACTS 69-76 (1974) (implicitly demonstrating the total inapplicability of this theory to the checkoff authorization situation).

21. *Gasaway v. Borderland Coal Corp.*, 278 F. 56, 65 (7th Cir. 1921) (stating that "the check-off is the voluntary assignment by the employee of so much of his wages as may be necessary to meet his union dues"). The contract of employment obligates the employer ("obligor") to pay the employee ("obligee") wages for work done, creating in the employee a right to these wages. "An obligee's transfer of a contract right is known as an *assignment* of the right. By an assignment, the obligee as *assignor* (B) transfers to an *assignee* (C) a right that the assignor (B) has against an *obligor*." E. FARNSWORTH, CONTRACTS 746 (1982) (emphasis in original). *See also In re Westmoreland Metal Mfg. Co.*, 69 L.R.R.M. (BNA) 2536 (E.D. Pa. 1968) (court held that dues which the employer withheld but failed to remit to the union were wages and thus entitled to a priority in bankruptcy proceedings, noting that the checkoff "was a voluntary arrangement in the nature of an assignment").

22. HOUSE COMM. ON EDUCATION AND LABOR, LABOR-MANAGEMENT RELATIONS ACT, 1947, H.R. REP. NO. 245 (Minority Report), 80th Cong., 1st Sess. 78, *reprinted in* LEGIS. HIST., *supra* note 9, at 292, 369.

23. 4 CORBIN ON CONTRACTS § 874, at 505-06 (1951):

It has long been established, also, that an employee has power to assign his right to future wages, to become due only after performance of services not yet rendered; and this is true even though there is no enforceable contract binding him to render the service or binding the employer to keep him employed. It is sufficient that at the date of the assignment there is an existing employment, an existing relation of master and servant, under which the wages assigned may reasonably be expected to be earned.

Id. (footnote omitted).

24. RESTATEMENT (SECOND) OF CONTRACTS § 331 (1981) ("An assignment may be conditional, revocable, or voidable by the assignor, or unenforceable by virtue of a Statute of Frauds.').

Furthermore, it may be revocable, or not, depending on whether it is gratuitous or for value.²⁵

To the extent that common law principles are relevant, it would appear that the Board and the courts should look to the law of contract assignments rather than the law of contract formation in dealing with checkoff authorizations.²⁶ At best, however, this would only provide the correct conceptual framework within which to begin the analysis. Regardless of what the common law might dictate, in resolving checkoff issues under the NLRA and the Taft-Hartley Act, the Board and the courts must rely primarily on other considerations—the broader policies of federal labor law, the specific statutory provisions, and the decisional law dealing with union security, which is the legal context within which this particular form of wage assignment operates.

C. *The Relative Importance of the Checkoff to Unions and Employers*

As is true of any organization, money is the life blood of a labor union. Apart from return on investments, this money comes from the dues and fees of members and employees that the union otherwise represents. Collecting these monies from each individual is a difficult task, even when payment is a condition of employment.²⁷ Certainly, threat of discharge provides a strong

25. An assignment is generally revocable unless it is "for value"—i.e., given: (a) in exchange for something that would be consideration for a promise, or (b) in satisfaction of a pre-existing debt or obligation. RESTATEMENT (SECOND) OF CONTRACTS § 332(5) (1981); U.C.C. § 1-201(44) (1987) (definition of value). Although the "exchange" element is lacking with respect to a checkoff authorization, it could be considered "in satisfaction" of the employee's contractual obligation of membership. Moreover, the checkoff might be considered irrevocable because it is a "signed writing." RESTATEMENT (SECOND) OF CONTRACTS § 332(1)(a) (1981) (in general, a gratuitous assignment is irrevocable if it is in a writing or under seal and delivered by the assignor).

26. The principal benefit of this change would be to free the Board from the "failure-of-consideration" morass that it has gotten into in dealing with the effect of a resignation from the union upon an employee's right to revoke the checkoff authorization. See *infra* notes 227-68 and accompanying text. If this issue were determined according to the law of assignment, it would become simply whether continued union membership was intended to be a condition of the ongoing authorization—assuming, of course, that the authorization was not revocable for some other reason.

27. 93 CONG. REC. 4777, 4806 (May 7, 1947) (remarks of Senator Pepper), *reprinted in* LEGIS. HIST., *supra* note 9, at 1307:

As a matter of sheer efficiency in a plant, the check-off principle is desirable. If union dues cannot be collected through the check-off principle, it means that the union must pay someone to go around and see the individual members and collect their dues. Perhaps the collectors will trespass upon the property of the employer or take part of the working time of the worker in an effort to collect the dues when the collector can find the members together. If it is not done at the place of employment the collector must tramp around from home to home to find the worker, who may be inclined toward recalcitrance or tardiness, and offer him an opportunity to pay his union dues.

Id.

incentive, but the actual enforcement of the sanction involves inconvenience and some risk of liability if the union's attempted enforcement is unwarranted.

These problems, however, are obviated with a checkoff arrangement. The employer simply deducts the money from the paycheck of each employee and sends the union a lump sum payment each month. Indeed, the checkoff is more than a convenience to some unions. A weak union representing a newly certified bargaining unit may find the checkoff essential to its survival.²⁸

On the other hand, the checkoff usually involves no more than minor administrative cost and inconvenience to the employer,²⁹ and may even be preferable to allowing union agents to collect dues on company property, which is a common alternative.³⁰ There are no other tangible business or management interests at stake, and employer opposition to the checkoff on noneconomic grounds raises the specter of possible bad-faith bargaining.³¹ In sum, unions have a strong incentive to demand a checkoff arrangement and employers generally have little incentive to resist that demand too vigorously. It is not surprising, therefore, that the checkoff is included in ninety-six percent of all collective bargaining agreements in manufacturing industries.³²

II. SECTION 302 REQUIREMENTS

The primary statutory provision applicable to the checkoff is section 302 of the Taft-Hartley Act, subsection (a), which broadly prohibits employers

28. This was arguably the case in *United Steelworkers v. NLRB (H.K. Porter, Co.)*, 363 F.2d 272 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 851 (1966), which involved a newly certified union in Danville, Virginia. The court noted that:

The union maintains no office in Danville, that area being serviced from Roanoke, Virginia, a distance of about 85 miles. Moreover, the 300 company employees live within a radius of from 35 to 40 miles from Danville. Thus without a check-off, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation.

Id. at 274. See *infra* notes 141-49, and 178-86 and accompanying text for a discussion of the *H.K. Porter Co.* litigation.

29. Even in the "green eye-shade" era of payroll operations, few employers who agreed to the checkoff tried to require unions to cover the cost of making the deduction, thus suggesting that it was probably insignificant. Theodore, *Checkoff Provisions in Major Union Contracts, 1958-59*, 83 MONTHLY LAB. REV. 26, 31 (1960). Under computerized payroll operations, which can be programmed to handle any number of mandatory and elective withholdings, the addition of a union dues checkoff would pose even fewer problems. See, e.g., *Cone Mills Corp.*, 169 N.L.R.B. 449, 457 (1968) ("When the Union offered to pay the cost of the checkoff, Cone refused stating that the cost thereof would be negligible as the payroll was handled on an IBM machine"), *order enforced in part and denied in part*, 413 F.2d 445 (4th Cir. 1969).

30. See *supra* note 27-28.

31. See *infra* Part III-B, discussing the application of the statutory duty to bargain collectively in good faith to the checkoff.

32. BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS ¶ 87:2 (1989). See also Theodore, *supra* note 29, at 26 (checkoff arrangement eliminates need to solicit individual members each month to ensure the union's financial stability).

from making payments of money or other things of value to labor unions and their representatives.³³ Subsection (c) then enumerates several exceptions, one of which is as follows:

The provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; . . .³⁴

Remedies for illegal payments include injunctions and other appropriate relief, even if the parties did not intend to violate the law.³⁵ Subsection (d), however, also provides for criminal penalties for willful violations of the section.³⁶ Because of this potential for criminal liability, the courts have tended to construe the checkoff exception of subsection (c) rather broadly.³⁷ The basic purpose of section 302, which was "to protect employers from

33. 29 U.S.C. § 186(a) (1982).

34. 29 U.S.C. § 186(c) (1982).

35. *Jackson Purchase Rural Elec. Coop. Assoc. v. Local Union 816, IBEW*, 646 F.2d 264, 266 & n.1 (6th Cir. 1981) (because section 302(a)(1) provides that it "shall be unlawful" to check off union dues without written authorization of employee, Congress did not intend that only willful violations were to be illegal (citing *International Longshoremen's Ass'n v. Seatrains Lines, Inc.*, 326 F.2d 916, 919 (2d Cir. 1964), and *Employees' Independent Union v. Wyman-Gordon Co.*, 314 F. Supp. 458, 460 (N.D. Ill. 1970))).

36. 29 U.S.C. § 186(d) (1982).

37. *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 11-12 (3d Cir. 1962) (broad construction of section 302 adopted by Department of Justice); see also *Justice Department's Opinion on Checkoff*, 22 L.R.R.M. (BNA) 46, 47 (1948) [hereinafter *DOJ Opinion*] (memorandum to Solicitor of Department of Labor, May 13, 1948, permits employer with a valid union security contract to deduct assessments, provided employee has voluntarily signed required authorization). At issue in *Food Fair Stores* were unfair labor practice charges against the employer under section 8(a)(3) and the union under section 8(b)(2) arising from the employer's deduction, upon request of the union backed by threat of arbitration, of a strike assessment. 307 F.2d at 4. The court's citation to and discussion of the Department of Justice's construction of section 302 was in response to the union's argument that because the term "periodic dues" in the unfair labor practice provisions of section 8 had been interpreted so as to exclude assessments such as the one at issue, the term "membership dues" in section 302 must be construed in the same way. *Id.* at 11-12. The narrower ambit of the terms of section 8, the court explained, was a result of the Board's "policy of protecting the employee from discharge, except for failure to pay 'periodic dues and initiation fees', strictly interpreting those terms as they appeared in sections 8(a)(3) and 8(b)(2)." *Id.* at 16 (emphasis added). Thus, the court held that "periodic dues" in section 8 did not include the strike assessment and enforced the Board's order against the charged unfair labor practices. *Id.* at 16, 21. Interestingly, the court modified the Board's order so as to require restitution of the assessment only to those employees who had not signed checkoff authorizations for "membership dues, initiation fees and assessments." *Id.* at 20. See *infra* notes 94-96 and accompanying text for a discussion of the relationship between section 302 and section 8(a)(3).

extortion and to insure honest, uninfluenced representation of employees,"³⁸ has also caused the courts to take a tolerant view of checkoff arrangements that run no risk of frustrating that purpose.

A. What May Be Checked-Off

Although the section 302(c)(4) exception speaks only in terms of "membership dues," the courts have allowed the checkoff of strike assessments,³⁹ supplemental dues,⁴⁰ "emergency dues,"⁴¹ percentage levies,⁴² a performance tax,⁴³ and agency shop fees.⁴⁴ This broad interpretation flows from an early

38. *United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974), *cert. denied*, 419 U.S. 998 (1974). See also *Schwartz v. Associated Musicians, Local 802*, 340 F.2d 228, 233-34 (2d Cir. 1964). The *Schwartz* court stated:

Congress intended by enacting [section 302] to: (1) protect welfare funds for the benefit of employees; (2) prevent corruption in the collective bargaining process through bribery of employee representatives by employers and extortion by employee representatives; (3) protect against the possible abuse by union officers of the power they might wield if welfare funds were left to their sole control.

Id.

39. *International Union of Mine Workers, Local 515 v. American Zinc, Lead & Smelting Co.*, 311 F.2d 656, 659 (9th Cir. 1963) (assessment to assist separate local union in its planned strike against the employer of its members is lawful if made pursuant to written authorization from employees).

40. *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1277-78 (9th Cir. 1983) (payment of supplemental dues and contributions to fringe benefit trust fund complied with section 302(c)(4) in part because of the "transitory nature of employment in the construction industry"), *cert. denied*, 464 U.S.-825 (1983).

41. *Cole v. Local 509, UAW*, 68 L.R.R.M. (BNA) 2097, 2102 (C.D. Cal. 1968) (emergency increase in regular periodic dues voted at special convention of local unions was lawful under section 101(a)(3) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 5411(a)(3) (1988), and employers' checkoff of such dues did not violate section 302(a)(1)).

42. *Denov v. Davis*, 61 L.R.R.M. (BNA) 2203, 2206 (1966) (collection of two percent "work dues" from band leaders was lawful under section 302 as payment required from leaders in their capacity as union members and was not payment made by an employer (citing *Zentner v. American Fed. of Musicians*, 237 F. Supp. 457 (S.D.N.Y. 1965))).

43. *Schwartz v. Associated Musicians, Local 802*, 340 F.2d 228, 234 (2d Cir. 1964) (payment of percentage levy, which was contingent upon employment and applied equally to all members who secured employment so as to qualify as "membership dues," was made pursuant to proper authorizations and was therefore lawful under section 302); *Carroll v. American Fed'n of Musicians*, 295 F.2d 484, 487 (2d Cir. 1961) (payment by band leaders of 1 percent "tax" and 10 percent "traveling surcharge" for engagements played outside of the jurisdiction of the local were not made pursuant to written authorization and district court should have granted injunction against them); *Associated Orchestra Leaders v. Philadelphia Musical Society, Local 77*, 203 F. Supp. 755, 759 (E.D. Pa. 1962) (applying *Carroll*, the court denied union's motion to dismiss because it had not shown that payment of 1 percent "engagement" and 10 percent "traveling" taxes were made pursuant to written authorizations even if they were "dues" within the meaning of section 302).

44. *Grajczyk v. Douglas Aircraft Co.*, 210 F. Supp. 702, 704-05 (S.D. Cal. 1962) ("there can be no logical or practical reason why the exemption of 'membership dues' [in section 302(c)(4)] should not be interpreted to include 'service fees,'" the monies paid in lieu of dues by nonmembers to the union under an agency shop provision in the collective bargaining agreement).

Justice Department memorandum of opinion on the terms of section 302(c)(4) which stated that "initiation fees and assessments, being incidents of membership, should be considered as falling within the classification of 'membership dues.'" ⁴⁵ Thus, what may voluntarily be checked off under the section 302(c)(4) exception is considerably broader than what may be made a condition of employment under the proviso to section 8(a)(3) of the Act, which is limited to "periodic dues and . . . initiation fees." ⁴⁶

While this broad reading of section 302(c)(4) allows for a wide variety of payments to the union, it also means that if a payment falls within the definition of "membership dues," the payment is illegal unless the requirements of the section are satisfied. That is, section 302(c)(4) has been read "as providing the exclusive method by which employers may contribute to the general purpose funds of unions." ⁴⁷ For example, where money was intended to compensate the union for the loss of dues revenue caused by job losses from technological change, the court characterized it as "payments in lieu of check-off" and therefore illegal because the requirement of a written authorization in section 302(c)(4) was not met. ⁴⁸

B. Limits on the Right to Revoke

1. Renewal of Authorization

The section 302(c)(4) exemption allowing the checkoff of union dues applies only if the employer has received a written assignment from each employee "which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner." ⁴⁹ The statute thus designates two times at which an employee must be able to revoke a checkoff authorization—the anniversary date of the authorization itself, and the expiration of the collective bargaining agreement. But section 302(c)(4)'s confusing double negative has caused several problems of interpretation.

The first question to arise was whether it required an employee to execute a new wage assignment every year. Section 302(c)(4) had been construed by its legislative detractors as imposing such a requirement. Senator Ives' concern, for example, was centered on the inconvenience to employers which

45. *DOJ Opinion*, *supra* note 37, at 47.

46. 29 U.S.C. § 158(a)(3) (1988). See *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 16 (3d Cir. 1962) (in enforcing Board order against unfair labor practice of checking off strike assessment, the court approved the Board's position "that it is of paramount importance that only the non-payment of 'periodic dues and initiation fees' to the exclusion of assessments [such as the strike assessment] shall constitute the criterion upon which discharge from employment for non-union membership may be enforced.").

47. *International Longshoremen's Ass'n v. Seatrains Lines, Inc.*, 326 F.2d 916, 920 (2d Cir. 1964).

48. *Id.*

49. 29 U.S.C. § 186(c)(4) (1982).

would result from the need for annual reauthorization.⁵⁰ Checkoff authorizations, however, commonly provide that they will be automatically renewed unless they are expressly revoked during certain so-called “window periods” before or after the two times designated by the statute—the authorization’s anniversary and the termination of the collective bargaining agreement.⁵¹ The Justice Department memorandum interpreting section 302(c)(4), by reading the statute narrowly, concluded that because such an authorization was not by its terms “irrevocable” for a period of more than a year, it was legal.⁵² The courts have consistently concurred with that interpretation,⁵³ at least to the extent of holding that new signatures are not needed every year.⁵⁴ Moreover, although a premature revocation will not be effective at the time it is made, it will prevent the authorization from being automatically renewed at the end of the year.⁵⁵

50. 93 CONG. REC. 4875, 4878 (1947), *reprinted in* LEGIS. HIST., *supra* note 9, at 1315. Senator Ives stated:

I am sure, moreover, that many employers will not be particularly pleased with that feature of the provision as here presented, which requires each employee, at least once a year, to specify in writing that he wants the check-off continued. This would add to the bedevilment of employers, who already are overburdened by paper work, by the number of reports, and other documents they have to prepare and submit, and the numerous procedures to which they are subjected.

Id. See also McNatt, *supra* note 10, at 124 (“it was obvious that neither the employer, the employee or the union wanted to undertake the tremendous administrative burden this annual renewal would involve”).

51. 29 U.S.C. § 186(c)(4) (1982).

52. *DOJ Opinion*, *supra*, note 37, at 47.

53. See, e.g., *Hayes v. Local No. 12, United Rubber Workers*, 523 F. Supp. 50, 54 (N.D. Ala. 1981) (authorization providing for automatic renewal gave employees the right to revoke during the window periods required by section 302 and “[t]here is no statutory right of an employee to effect, at whatever time he pleases, a non-anniversary revocation of his authorization”); *Monroe Lodge No. 770, IAM v. Litton Business Systems, Inc.*, 334 F. Supp. 310, 314 (W.D. Va. 1971) (automatic renewal clause contained in authorization with window periods at the anniversary date and the termination of the collective bargaining agreement did not deprive employee of right to change his mind about dues checkoff after one year), *aff’d*, 523 F.2d 783 (4th Cir. 1971), *cert. denied*, 409 U.S. 879 (1972); *Brooks v. Continental Can Corp.*, 59 L.R.R.M. (BNA) 2779, 2782 (S.D.N.Y. 1965) (in rejecting attack upon automatic renewal clause of authorization, the court noted that the employee was free to reconsider “whether or not he wanted the assignment in effect and irrevocable for each succeeding year,” and the automatic renewal clause was in both the collective bargaining agreement and the authorization which the employee had executed, thereby protecting the employee’s freedom of choice (citing *Felter v. Southern Pac. Co.*, 359 U.S. 326, 334 (1959))).

54. Whether these automatically renewed authorizations remain absolutely irrevocable for another year is a separate issue. See *infra* sources cited in Parts-D, E & F.

55. *Monroe Lodge 770, IAM*, 334 F. Supp. at 316-17. The employer received many revocations from employees dissatisfied with an increase in their dues during the last months of the first year of the collective bargaining agreement and several months of its second year. *Id.* at 312. The window period was fifteen days within the anniversary date or the expiration of the collective bargaining agreement, but the employer honored the revocations without regard to their date. As to the revocations submitted before the expiration of the contract’s first year, the court stated that “there can be no doubt that the Company was wrong in honoring these

2. *Hiatus of Collective Bargaining Agreement*

Revocations that occur during a so-called "hiatus" period, i.e., when no collective bargaining agreement is in effect, have caused enormous problems of contract and statutory interpretation. In *Murtha v. Pet Dairy Products Co.*,⁵⁶ the Tennessee Court of Appeals held that an employee may revoke at will during this period. The checkoff authorization in *Murtha* provided that it was irrevocable:

[F]or the term of the applicable contract . . . or for one year, which ever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is the lesser, unless I give written notice . . . at least 60 days and not more than 75 days before any periodic renewal date . . . of my desire to revoke the same.⁵⁷

After the contract expired, the parties agreed to continue its provisions in effect until they reached a new agreement. During that period, however, many employees attempted to revoke their checkoff authorizations. The court held that revocation according to the terms of the authorization would be literally impossible because during the hiatus period the termination dates of not only the verbal extension of the expired contract, but also of the contract which was still being negotiated, were both indeterminate.⁵⁸ Thus, the court concluded that the authorizations were necessarily revocable at will.

The court did not address the question of why the fifteen-day window period specified in the authorization could not have been established by reference to each authorization's anniversary date. Indirectly, an answer to this can be found in *Anheuser-Busch, Inc. v. International Brotherhood of Teamsters, Local 822*,⁵⁹ a later decision of the Court of Appeals for the Fourth Circuit. After the collective bargaining agreement expired several employees attempted to revoke their checkoff authorizations, which provided for fifteen-day window periods, as had been the case in *Murtha*. The union argued that because the revocations, which were submitted during the hiatus between contracts, did not fall within the fifteen-day window period prior to either the anniversary of the authorization, or the expiration date of the old contract, the authorizations had been automatically renewed for another year.

revocations." *Id.* at 314. Those revocations submitted during the second year of the contract were also ineffective as to that year, but they did "[give] the Company and the Union notice of the employees' desire to discontinue the deductions, and it was unnecessary for the employees to resubmit revocations during the fifteen day period at the end of the second year." *Id.* at 317 (citing *Felter v. Southern Pac. Co.*, 359 U.S. 326, 335 (1959)).

56. 44 Tenn. App. 460, 314 S.W.2d 185 (1958).

57. *Id.* at 465, 314 S.W.2d at 189 (unofficial reporter diverges).

58. *Id.* at 471, 314 S.W.2d at 190 (employees "were unable to determine either the 'termination date' of the verbal agreement [which was of indefinite duration], or the 'periodic renewal date' of the new contract [which had not yet been agreed to]").

59. 584 F.2d 41 (4th Cir. 1978).

The employer, on the other hand, argued that the revocations were effective for two closely related reasons, one contractual and the other statutory. First, the employer argued that, as in *Murtha*, once the contract expired it was impossible to determine a renewal date against which to measure the window period. Furthermore, as in *Murtha*, the terms of the checkoff authorization with respect to revocation became irrelevant, making the authorization revocable at will. In response to the union's claim that the window period could still be established by reference to the authorization anniversary date, the employer argued that if one of the two possible periods for revocation becomes incapable of ascertainment, the entire revocation limitation provision fails, making the authorization revocable at will.⁶⁰

Second, the employer also argued that, regardless of how the authorization should be construed, the employees had an absolute statutory right to revoke their checkoff authorizations at the expiration of the contract. Essentially, the employer's statutory argument was that a window period, which opened up some two months in advance of the actual expiration of the collective bargaining agreement, did not satisfy the statutory requirement that the authorization be revocable upon the expiration of the contract.⁶¹

In a somewhat cryptic decision, the Fourth Circuit upheld the right of the employer to honor the revocations. The court relied on *Murtha* for the proposition that an authorization is revocable at will when it becomes impossible to determine "one of the times" that the authorization and the statute allow for revocation.⁶² But the court also apparently agreed with the

60. Brief for Plaintiff-Appellee at 20-21. The employer argued:

The short answer to this contention is that the authorization contract between the member and the Union guarantees to the member two escape periods and the Union's construction would render one of them meaningless. In addition, the Union's authorization form states that the employee will be permitted to select the shortest of the two escape periods and the Union's construction would simply read this employee right completely out of the authorization contract. Superimposed upon the commitments contained in the Union's authorization contract is the requirement of Section 186(c)(4) [section 302(c)(4)] which states that the authorization shall not be irrevocable for the lesser of two distinct periods, one of which is inextricably related to the existence of a collective agreement of a definite term. To construe the contract as the Union would construe it, would simply amount to a wholesale rewriting of the authorization contract so as to permit only one annual escape period and thus place the authorization in direct contravention of the statutory mandate contained in Section 186(c)(4) [section 302(c)(4)].

Id.

61. *Id.* at 24-25. The employer also pointed out that the Justice Department memorandum which gave approval to automatically renewing checkoff authorizations referred only to *annual* renewals prior to the anniversary date of the authorization. *Id.* at 2. The employer thus argued that the memorandum did not address the issue of whether an authorization could be automatically renewed if an employee failed to revoke during a window period prior to the expiration of the contract.

62. *Anheuser-Busch, Inc. v. International Bhd. of Teamsters, Local 822*, 584 F.2d 41, 44 (4th Cir. 1978) (citing *Murtha v. Pet Dairy Prods. Co.*, 44 Tenn. App. 460, 314 S.W.2d 185 (1957)).

employer's broader argument that the statute absolutely guarantees a right to revoke an authorization at the expiration of the collective bargaining agreement and, implicitly, that this right cannot be waived or defeated by the terms of the checkoff authorization itself.⁶³ The court thus concluded that the statute "guaranteed the employees the right to revoke their checkoff authorizations at will during the hiatus between collective bargaining agreements."⁶⁴ In effect, the *Anheuser-Busch* decision held that during the final year of a contract an employee may revoke this type of checkoff authorization at three distinct times: the window period before the anniversary date, the window period before the expiration of the contract, and upon the expiration of the contract.⁶⁵

The *Murtha* and *Anheuser-Busch* cases both involved checkoff authorizations that allowed revocations only during window periods that opened up *prior to* the expiration of the contract. Because the statute also allows revocation *upon* expiration of the contract, the courts allowed revocations during the entire contract hiatus period. It would appear, however, that as long as some revocation at expiration of the collective bargaining agreement is provided for, the checkoff authorization may otherwise limit or define it. For example, in *Hayes v. Local No. 12, United Rubber Workers*,⁶⁶ the authorization allowed revocation during a ten day window period *following*

63. *Id.* (citing *Atlanta Printing Specialties*, 215 N.L.R.B. 237, 238 (1974) (a premature extension of a collective bargaining agreement cannot defeat the right of an employee to revoke under a window period determined by reference to the expiration date of the old contract), *enforced*, 523 F.2d 783, 788 (5th Cir. 1975) (section 302(c)(4) "guarantees employees an opportunity to revoke dues checkoff authorizations at the expiration of each collective bargaining agreement.'')).

64. 584 F.2d at 43. The court also rejected the union's claim that checkoff agreements and collective bargaining agreements are totally independent covenants, thus suggesting that section 302 makes a checkoff agreement valid only if it is pursuant to an in-force collective bargaining agreement. Certainly, the language and structure of section 302(c)(4) would indicate that Congress contemplated that checkoff agreements would operate in that context. This interpretation is reinforced by the fact that the abuses section 302 was designed to correct are more likely to occur where the relationship between the employer and the union is not formalized and constrained by the terms of a collective bargaining agreement. In that situation, the section 302(c)(4) exception for the checkoff of membership dues should also not apply.

65. The union had argued that the creation of this "third open period" was contrary to the intent of Congress. Reply Brief for Defendant-Appellant Local 822, at 6-7.

66. 523 F. Supp. 50 (N.D. Ala. 1981). The dispute between the employer and the union as to the date appropriate to determination of the window period relative to expiration of the contract was centered on the issue of whether the old contract expired on the date which it specified for its termination or instead whether the old contract expired on the date, some four months later, on which the new agreement became effective at the plant where the plaintiff employees worked. *Id.* at 52-53. The union had prevailed in arbitration, with the arbitrator's award including the finding that the old contract had expired according to the date it specified, and therefore he ruled that "non-anniversary revocations *not received within the window period following [the contract's specified termination date]* were to be deemed untimely." *Id.* at 53 (emphasis added). For a discussion of the role of arbitration under federal labor policy, see *infra* Part IV.

either the anniversary of the authorization or the termination of the contract. The court held that revocations at other times during the hiatus period were ineffective.

Although that result is entirely consistent with the rule of *Murtha* and *Anheuser-Busch* that employees have a statutory right to revoke upon the expiration of the contract, in explaining its decision, the court used language that suggests disagreement with the three-revocation period analysis of those cases. The court explained that section 302(c)(4) provides for two opportunities for revocation—one on the anniversary date, and the other on the date of the contract's termination.⁶⁷ However, "[t]here is no statutory right of an employee to effect, at whatever time he pleases, a non-anniversary revocation of his authorization."⁶⁸ If applied to the facts of *Murtha* and *Anheuser-Busch*, that language would suggest a result that was different from the one that was reached in those cases. Thus, the only certainty under section 302(c)(4) as construed by the Board and the courts is that the right of an employee to revoke a checkoff authorization during a contract hiatus period remains somewhat uncertain.

C. Enforcement Mechanisms

Section 302 itself does not contain a mechanism for enforcing checkoff agreements. Rather, it operates as a limit on them. If, however, a collective bargaining agreement does contain a checkoff provision, then it can be enforced in district court under section 301.⁶⁹ If the agreement also contains an arbitration provision, then section 301 will require that the question first be resolved by an arbitrator.⁷⁰ If the arbitrator holds that the employer is liable to the union for the dues it has not withheld and forwarded, then the

67. 523 F. Supp. at 54 (citing 29 U.S.C. § 186(c)(4) (1982)). The court also stated, "[a]s the statute requires, each class member in the case at bar is accorded the right to revoke his authorization at least once every year; and in some situations, such employees may revoke during two separate window periods in those years in which the contract terminates." *Id.*

68. *Id.* at 54. The court stated, "[t]he parties . . . were free to utilize the contract termination date as the beginning of the window period for non-anniversary revocations, without offending the [employees'] statutory rights." *Id.* See also *Associated Press v. NLRB*, 492 F.2d 662, 666 (D.C. Cir. 1974) (upholding NLRB deferral to an arbitration decision which disallowed non-anniversary revocations during a contract hiatus period).

69. 29 U.S.C. § 185 (1982). Section 301 is the statutory provision which gives federal district courts jurisdiction over the enforcement of collective bargaining agreements. Section 185(a) provides in part:

Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

70. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (an "order to arbitrate [a] particular grievance [arising under a collective bargaining agreement] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

usual remedy would be for the employer to be required to pay the union that amount, and this may be without any right of recoupment against the employees. If recoupment is not allowed and the union attempts to have the award enforced in federal court under section 301, then the employer is likely to defend on the grounds that the award orders it to do something which violates section 302.

The employer's argument is as follows: it is being ordered "to pay . . . money . . . to [the] labor organization . . . which represents . . . employees of such employer."⁷¹ Section 302 declares this to be unlawful, and since the payment does not come from money that has been deducted from the wages of the employees, it does not fall within the subsection (c)(4) exemption. In *United Steelworkers v. United States Gypsum Co.*,⁷² the district court accepted the logic of that argument. It therefore modified the arbitration award in that case to allow the employer to deduct the money from the future wages of the affected employees.⁷³

The court of appeals held, however, that although the required payment did not fall within the checkoff exception of section (c)(4), it was nonetheless covered by the section (c)(2) exception with respect to the payment of money pursuant to an award of an arbitrator.⁷⁴ The court further held that the arbitrator did not exceed his remedial authority by requiring the employer to pay the money without recoupment from the employees.⁷⁵ The District of Columbia Court of Appeals recently reached the same conclusion in *Washington Post v. Washington-Baltimore Newspaper Guild, Local 35*.⁷⁶

71. 29 U.S.C. § 186 (1982).

72. 339 F. Supp. 302, 308 (N.D. Ala. 1972) ("such a ruling [is] . . . clearly in violation of 29 U.S.C. § 186(a), that is, insofar as dues for persons still in its employ and hence subject to payroll deductions. The object is to compensate the [union] for its loss, not to penalize . . . the [employer]"), *reversed in relevant part*, 492 F.2d 713 (5th Cir. 1974), *cert. denied*, 419 U.S. 998 (1974).

73. 339 F. Supp. at 308. The court, however, did not adhere rigorously to the logic of its position. With respect to employees who were no longer employed, the court said that "the burden of recompense must be borne by the defendant as in the nature of damages caused the union by its actions." *Id.*

74. 492 F.2d 713, 734 (5th Cir. 1974). This exception applies to:

[T]he payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress.

29 U.S.C. § 186(c)(2) (1982).

75. 492 F.2d at 734.

76. 787 F.2d 604, 608-09 (D.C. Cir. 1986). The issue was whether section 302 precluded an arbitrator from ordering an employer to reimburse a union for dues lost as a consequence of the employer's breach of the collective bargaining agreement. The court upheld the arbitration award. *Id.* at 605. After one of the paper's managing editors told four columnists that they were excluded from the bargaining unit under the contract, the columnists resigned from the union and revoked their checkoff authorizations. *Id.* The arbitrator ruled that the columnists were not excluded from the unit under the contract, and as a remedy ordered the paper to reimburse the union for its lost dues. The employer's lawsuit claimed that this award violated

A problem related to enforcement of the checkoff may also arise when the employer has faithfully withheld dues, but there are two unions claiming entitlement to the money. In this situation it would appear that an employer should be allowed to bring an interpleader action under either Rule 22 of the Federal Rules of Civil Procedure or 28 U.S.C. § 1335.⁷⁷ However, in *Sun Shipbuilding & Dry-Dock Co. v. Industrial Union of Marine Workers*,⁷⁸ the court dismissed an employer's statutory interpleader action in a checkoff dispute of this kind. The collective bargaining agreement, to which both the international and the local were parties, required the employer to checkoff and forward dues to the local. When members of the local disaffiliated themselves from the international and took all the property and assets with them, the international appointed a new set of provisional officers for the local. Both groups claimed entitlement to the monies which had been checked off and the employer therefore brought an interpleader action. The court's primary concern was in finding jurisdiction. There was no diversity of citizenship and the court held that the dispute did not arise under section 301. Rather, the court viewed the matter as a "family squabble"⁷⁹ between the two union groups over who was entitled to the money and noted, "[o]bviously, *this dispute* did not arise out of a violation of any collective bargaining agreement."⁸⁰

What the court ignored, however, was that the employer was potentially liable under the collective bargaining agreement to one or the other of these two union groups, and that either one of them could have brought an action to collect the money under section 301. In other words, there was a dispute between the employer and these two union groups, it grew out of the collective bargaining agreement, section 301 gave the federal courts jurisdiction over that dispute, and an interpleader action was thus appropriate to resolve the competing claims to the dues.⁸¹

III. SECTION 8 REQUIREMENTS

A. Generally

Section 8 of the Act, which defines employer and union unfair labor practices, does not refer specifically to checkoff arrangements. But such

section 302(c)(4) because the requisite authorizations had been revoked. The court upheld the arbitrator's award because section 302 has several *alternative* exceptions, and in this case section 302(c)(2) provided for payments from employers to unions in satisfaction of such awards. *Id.* at 606-07.

77. FED. R. CIV. P. 22 provides that "[p]ersons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability." There is also a statutory provision which allows for interpleader, 28 U.S.C. § 1335 (1982), which differs from Rule 22 primarily in that it requires that there be "[t]wo or more adverse claimants, of diverse citizenship."

78. 95 F. Supp. 50 (E.D. Pa. 1950).

79. *Id.* at 53.

80. *Id.* (emphasis added).

81. *Cf. General Electric Co. v. Emspak*, 94 F. Supp. 601 (S.D.N.Y. 1950) (allowing an interpleader action to resolve a dispute between an employer and two union groups).

arrangements nevertheless implicate almost every part of section 8. This part of the Article discusses the following six unfair labor practice issues: the checkoff as a mandatory subject of collective bargaining; the employees' right to be free from coercion; the problem of a hiatus between contracts; the effect of employee resignations from the union on the power to revoke checkoff authorization; additional factors bearing on revocability; and finally, monetary remedies for unfair labor practices involving the checkoff. A brief overview of these issues and the statutory framework precedes this part's more detailed discussion.

Checkoff arrangements are a mandatory subject of collective bargaining, thus requiring good faith negotiations under section 8(a)(5)⁸² and 8(b)(3) of the Act.⁸³ An employer violates section 8(a)(1) (interference with the employee's right to not support the union),⁸⁴ section 8(a)(2) (illegal employer support of the union),⁸⁵ and section 8(a)(3) (illegal employer encouragement of union membership)⁸⁶ if it agrees to a checkoff arrangement with a minority union (one which does not have the support of a majority of the employees in the bargaining unit as their exclusive representative) or a union that it dominates or controls, or if it requires or encourages employees to sign a checkoff authorization form, or if it simply checks off union dues without the proper employee authorization. On the other hand, by refusing to honor a valid authorization, the employer breaches the section 8(d) duty to observe the terms of the collective bargaining agreement.⁸⁷

82. 29 U.S.C. § 158(a)(5) (1982) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." Collective bargaining is described in 29 U.S.C. § 159(a) (1982) "in respect to rates of pay, wages, hours of employment, or other conditions of employment." *Id.* See *infra* notes 100 and 103 for a discussion of the concept of mandatory subjects of bargaining.

83. 29 U.S.C. § 158(b)(3) (1982) makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided [the union] is the representative of his employees." *Id.*

84. 29 U.S.C. § 158(a)(1) (1982) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7 of the NLRA]." *Id.* Section 7 of the NLRA provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and [may also refrain from such activities unless affected by an agreement requiring membership as a condition of employment].

Id.

85. 29 U.S.C. § 158(a)(2) (1982) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." *Id.*

86. 29 U.S.C. § 158(a)(3) (1982) provides that an employer commits an unfair labor practice "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

87. 29 U.S.C. § 158(d) (1982) defines the duty to bargain collectively as including the requirement that "no party to such contract shall terminate or modify such contract." *Id.*

On the union's side, if it coerces an employee into signing a checkoff authorization or causes an employer to checkoff dues when the employee has not properly authorized it, this will constitute interference with the employee's right to refrain from union activity in violation of section 8(b)(1)(A);⁸⁸ it will also violate the section 8(b)(2)⁸⁹ prohibition against causing an employer to engage in conduct encouraging union membership, mentioned above. Thus, the checkoff raises issues under almost every part of section 8 of the NLRA.

The unfair labor practice aspects of checkoff arrangements did not, however, become a major issue until after passage of the Taft-Hartley Act in 1947. Prior to that time, the general rule was that a checkoff agreement violated the statute only if it was made with an organization that was company-dominated, or which for some other reason did not represent an uncoerced majority of the employees.⁹⁰ The 1947 amendments changed that rule in two ways.

First, under the original National Labor Relations Act, employers and unions were free to negotiate "closed shop" agreements, requiring actual union membership as a condition of initial employment.⁹¹ To ensure that the employees always satisfied the financial obligations of this coerced membership, unions also frequently negotiated mandatory nonrevocable checkoff arrangements on behalf of the entire membership.⁹² When the 1947 amendments limited the scope and nature of permissible union security arrangements,⁹³ checkoff arrangements became analogously constrained.

Second, section 302 itself provided the impetus for a more expansive reading of some of the unfair labor practice sections. The Board openly denies that section 302 has had this effect. It has consistently taken the position that "the limitations on checkoff in section 302 were intended neither to create a new unfair labor practice, nor even to be considered in determining whether checkoff violates section 8 of the Act."⁹⁴ Thus, the

88. 29 U.S.C. § 158(b)(1)(A) (1982). "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157." *Id.*

89. 29 U.S.C. § 158(b)(2) (1982) makes it an unfair labor practice for a union:

[T]o cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

Id.

90. *See, e.g., Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533 (1943).

91. T. HAGGARD, *supra* note 4, at 34.

92. *See* 3 L. TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* 1633 (1940) (sample form of collective bargaining agreement checkoff provision for employer to make deductions from union members as well as nonmembers).

93. *See supra* note 4 for the text of section 8(a)(3).

94. *Salant & Salant, Inc.*, 88 N.L.R.B. 816, 817 (1950). This conclusion was based on three

Board has consistently adhered to the position that merely because a checkoff arrangement is *not* illegal under section 302 does not necessarily mean that it is also *not* illegal under a section 8 analysis.⁹⁵ Reading section 8 more broadly than section 302 has been justified on the grounds that while the former merely involves an unfair labor practice, the latter carries with it the possibility of criminal penalties.⁹⁶

On the other hand, despite its claims to the contrary, the Board clearly has read into section 8 the section 302 requirement that the authorizations be voluntary and that they not be irrevocable for longer than a year.⁹⁷ This infusion of section 302's terms into section 8 can be justified, however, on the grounds that if employer and union conduct violates the civil and potentially criminal provisions of section 302, it necessarily falls under the section 8(a)(1) prohibition against restraint, interference, and coercion of employees in the exercise of their section 7 rights to refrain from union activity.

B. The Duty to Bargain Over Checkoff Arrangements

1. Checkoff as a Mandatory Subject of Bargaining

The first section 8 issue involves the status of the checkoff as a subject of collective bargaining.⁹⁸ Employers and unions alike have a duty under the

factors: (1) The original House version of the Bill, which was not adopted in this regard, made checkoffs that did not meet certain requirements an unfair labor practice; (2) the restrictions on checkoff that were adopted appear in an entirely different title from that containing the unfair labor practices; and (3) section 302 provides for its own specific methods for enforcing the prohibition against certain kinds of checkoff. *Id.* at 817-18. *See also* Frito-Lay, Inc., 243 N.L.R.B. 137, 138 (1979) (violation of section 302(c)(4) is not *per se* an unfair labor practice); Baggett Indus. Constr., Inc., 219 N.L.R.B. 171, 172 (1975) ("since [*Salant and Salant*], the Board has consistently held that failure to comply with the requirements of Section 302 does not constitute an unfair labor practice" and can not be considered when deciding whether checkoff violates section 8); Bisso Towboat Co., Inc., 192 N.L.R.B. 885, 886 (1971) ("violations of Section 302 are not *per se* violations of Section 8(a)(2)").

95. *Kresge Dept. Store*, 77 N.L.R.B. 212, 214 (1948) (section 302 does not legitimize the contribution of support to labor unions which are illegal under section 8(a)(2)).

96. *See, e.g., NLRB v. Brotherhood of Ry. Clerks*, 498 F.2d 1105, 1107-08 (5th Cir. 1974) (severance of employment also severs obligations of checkoff and mere fact of legality under section 302 not determinative of section 8 issue); *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 12 (3d Cir. 1962) (broad construction of section 302 is consistent with criminal penalties for its violation, while narrow construction of sections 8(a)(3) and 8(b)(2) is consistent with protection of employees intended to be afforded and is "completely extrinsic" to the enforcement of section 302); *NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52, 55 (2d Cir. 1967) ("Congress' determination that only certain checkoff arrangements should give rise to criminal penalties, § 302(d), or be enjoinable, § 302(e), did not immunize all others from scrutiny under § 8 by the" NLRB), *cert. denied*, 389 U.S. 843 (1967).

97. *See, e.g., Atlanta Printing Specialties Union, Local 527 (The Mead Corp.)*, 215 N.L.R.B. 237, 238 (1974) (concluding that the union violated section 8(b) by "causing the Employer to dishonor the employees' revocation notices . . . , thus restraining and coercing the employees in the exercise of their statutory right to revoke their checkoff authorizations" within the previously-established revocation period), *enforced*, 523 F.2d 783 (5th Cir. 1975).

98. *See generally* Comment, *Union Dues Checkoff as a Subject in Labor-Management*

Act to bargain in "good faith with respect to wages, hours, and other terms and conditions of employment,"⁹⁹ and the refusal to do so is an unfair labor practice.¹⁰⁰ Determining whether a particular topic fits within those statutory terms has not been an easy task for the Board and the courts, and checkoff proposals exemplify this difficulty.

Prior to the Taft-Hartley Act amendments to the NLRA, there was a split of authority with respect to whether or not the checkoff was a mandatory subject of bargaining. In *NLRB v. Reed & Prince Manufacturing*,¹⁰¹ the First Circuit implicitly recognized that it was, apparently because checkoff issues had frequently been dealt with in contract negotiations.¹⁰² The Supreme Court was later to adopt that criterion in *Fibreboard Paper Products Corp. v. NLRB* as one of the touchstones of a mandatory subject of bargaining.¹⁰³

Negotiations: Good Faith Bargaining and NLRB Remedies, 39 *FORDHAM L. REV.* 299, 300-04 (1970) (the Board and most courts agree that dues checkoff is a mandatory subject of bargaining); Note, *Check-off of Union Dues Under the NLRA—A Federally Protected Bargaining Issue*, 26 *IND. L.J.* 443, 447 (1951) (deduction of membership dues traditionally has been a subject of negotiations, and therefore falls within the duty to bargain).

99. 29 U.S.C. § 158(d) (1982).

100. Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1982) makes it an unfair labor practice for an employer to refuse "to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." *Id.* Collective bargaining is described in 29 U.S.C. § 159(a) (1982), "in respect to rates of pay, wages, hours of employment, or other conditions of employment." *Id.* Similarly, the section 8(d) definition of collective bargaining refers to "wages, hours, and other terms of conditions of employment," thus limiting the duty to bargain to subjects which fall within that description. The union's correlative duty to bargain is set forth in section 8(b)(3), 29 U.S.C. § 158(b)(3) (1982) (unfair labor practice for union "to refuse to bargain collectively with an employer," provided that it is the exclusive representative of the employees under section 9(a), § 159(a)). This Article refers to the employer's statutory obligation to collectively bargain under sections 8(a)(5) and 8(d) as the "duty to bargain."

101. 118 F.2d 874 (1st Cir. 1941), *cert. denied*, 313 U.S. 595 (1941).

102. *Id.* at 883 (clause in contract that union and employees agree not to request checkoff system "would have been illegal as against the public policy expressed in the Act, in that it forestalled future collective bargaining upon matters which were 'frequent subjects of negotiation between employers and employees.' " (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940))). See also *NLRB v. Whittier Mills Co.*, 123 F.2d 725, 728 (5th Cir. 1941) (employer's refusal to agree to checkoff was not unlawful refusal to bargain because neither the Board nor the courts can make collective bargaining agreements for the parties, nor can they prescribe any terms of such agreements); *M. T. Stevens & Sons Co.*, 68 N.L.R.B. 229, 230 (1946) (employer had not foreclosed possibility of future bargaining on checkoff provision, and to have done so would have been unlawful because provision is a "proper subject for collective bargaining").

103. 379 U.S. 203, 211 (1964). The *Fibreboard* Court stated:

While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process.

Id. (footnote omitted). First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), is the key Supreme Court decision on mandatory subjects of bargaining. The duty to bargain attaches "only if the subject proposed for discussion is amenable to resolution through the bargaining

On the other hand, in *Hughes Tool Co. v. NLRB*¹⁰⁴ the Fifth Circuit denied that an employer has a statutory duty to bargain with a union over a checkoff arrangement. Apparently, the court's theory was that this did not involve a relationship between employer and employee vis-a-vis wages, hours, or working conditions. Rather, the court indicated that the union's financial support was purely a matter between the union and its members.¹⁰⁵ This reasoning is similar to the test that the Supreme Court later used in *NLRB v. Wooster Division of Borg-Warner Corp.*, where the Court suggested that a mandatory subject of bargaining is one which "regulates the relations between the employer and the employees" and not one which "deals only with relations between the employees and their unions."¹⁰⁶

Although legitimate arguments could thus be made on both sides of the issue, after the Taft-Hartley Act amendments, the Board concluded that Congress clearly intended for union proposals concerning a checkoff arrangement to be a mandatory subject of collective bargaining. In *United States Gypsum Co.*,¹⁰⁷ the Board found that the company had not bargained in good faith over a variety of subjects, including the checkoff. In a footnote, the Board recognized the prior split of authority but said, "we are satisfied from the language and legislative history of the 1947 amendments that Congress intended that the bargaining obligation contained in Section 8(a)(5) should apply to checkoff."¹⁰⁸ The Board then cited, without discussion, four pieces of legislative history—none of which, however, is conclusive of the issue.¹⁰⁹ Nevertheless, since then, the Board and the courts have consistently

process." *Id.* at 678. The Court articulated a balancing test which mandates "bargaining over management decisions that have a substantial impact on the continued availability of employment . . . only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the [employer's] conduct of the business." *Id.* at 679. See Turner, *Predecision Bargaining and the Core of Entrepreneurial Control: The Ups and Downs of Otis Elevator*, 39 DE PAUL L. REV. 43 (1989) (discussing recent Board and court decisions on mandatory bargaining subjects and examining the need for a definitive test to replace the various approaches taken by Board members in *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984)).

104. 147 F.2d 69 (5th Cir. 1945).

105. *Id.* at 74. In determining that the collection of dues was not a mandatory bargaining subject, the court stated that "[t]he Act makes no provision for paying the [union]. Where a union serves as such, it looks for its financial support to the agreement of its members to pay dues. The law gives no lien on the wages for the dues." *Id.*

106. 356 U.S. 342, 349-50 (1958). See also *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971) ("In general terms, [the duty to bargain] includes only those issues that settle an aspect of the relationship between the employer and the employees."). See *supra* notes 100 & 103 for discussion of mandatory bargaining subjects.

107. 94 N.L.R.B. 112 (1951).

108. *Id.* at 113 n.7.

109. The first reference was to the page in the original House version of the amendments where mandatory subjects are specifically listed. H.R. 3020, 80th Cong., 1st Sess. 9-10 (1947), reprinted in LEGIS. HIST., *supra* note 9, at 166-67. The checkoff is not mentioned. Second, the Board also cited the Minority House Report on the House version of the bill which specifically noted that "[i]t seems clear that the definitions are designed to exclude collective bargaining concerning . . . check-off provisions . . . and a host of other matters traditionally the subject

regarded the checkoff as a mandatory subject of bargaining.¹¹⁰

2. "Good Faith" Bargaining

The more difficult question has been what constitutes "good faith" bargaining over the checkoff. The law's attempt to legislate a state of mind has been regarded by many as an exercise in futility,¹¹¹ and the cases dealing with bargaining over the checkoff provide a classic example of why this might be so. "Good faith" has been defined as "a *bona fide* intent to reach an agreement if agreement is possible."¹¹² Despite the statutory prohibition against requiring an employer to make concessions or agree to any particular proposal,¹¹³ the Board and the courts look with a jaundiced eye upon

matter of collective bargaining." HOUSE COMM. ON EDUCATION AND LABOR, LABOR-MANAGEMENT RELATIONS ACT, 1947, H.R. REP. NO. 245, 80th Cong., 1st Sess. 71 (1947), *reprinted in* LEGIS. HIST., *supra* note 9, at 362. Third, the Board cited the House Conference Report summarizing the House version in this regard and comparing it with the final version. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 34 (1947), *reprinted in* LEGIS. HIST., *supra* note 9, at 538. Presumably, the Board concluded from these three references that congressional rejection of the original House version of the amendments meant that Congress intended for the checkoff to be a mandatory subject. Finally, the Board also cited a page in the House report where it merely referred to the prevalence of the checkoff in many plants. HOUSE COMM. ON EDUCATION AND LABOR, LABOR-MANAGEMENT RELATIONS ACT, 1947, H.R. REP. NO. 245, 80th Cong., 1st Sess. 29 (1947), *reprinted in* LEGIS. HIST., *supra* note 9, at 320. Apparently, the Board read this as some kind of congressional "approval" of checkoffs, thus making them a mandatory subject of bargaining.

110. *See, e.g.,* Caroline Farms Div. of Textron, Inc. v. NLRB, 401 F.2d 205, 210 (4th Cir. 1968) ("Union security, including dues checkoff, is a mandatory subject of bargaining"); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 136 (1st Cir. 1953) (although the court merely said this was a "proper" subject for collective bargaining, this has been construed as meaning it was mandatory rather than merely permissive), *cert. denied*, 346 U.S. 887 (1953); Bethlehem Steel Co., 136 N.L.R.B. 1500, 1501-02 (1962) ("[t]here can be little doubt that . . . checkoff . . . affect[s], or may affect . . . 'wages, hours, and other terms and conditions of employment'"), *enforcement denied on other grounds*, 320 F.2d 615 (3d Cir. 1963).

111. *See, e.g.,* LABOR STUDY GROUP, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 82 (Committee for Economic Development, 1961).

Parties have been told that they must bargain in good faith, and elaborate tests have been devised in an attempt to determine "objectively" whether the proper subjective attitude prevails. The limitations and artificiality of such tests are apparent, and the possibilities of evasion are almost limitless. . . . Basically, it is unrealistic to expect that, by legislation, "good faith" can be brought to the bargaining table.

Id.

112. Atlas Mills, Inc., 3 N.L.R.B. 10, 21 (1937); *see also* NLRB v. Gulf Power Co., 384 F.2d 822, 825 (5th Cir. 1967) (duty to bargain in good faith requires the parties to confer and negotiate in a genuine effort to reach an agreement if it is possible to do so); NLRB v. Generac Corp., 354 F.2d 625, 628 (7th Cir. 1965) ("[g]ood faith means sincerity, candor and a willingness to negotiate toward the possibility of effecting compromises"); Borg-Warner Controls, 198 N.L.R.B. 726, 729 (1972) (defining "bad faith" by reference to engaging in "bargaining conferences with no intention of reaching agreement with the Union").

113. Section 8(d), 29 U.S.C. § 158(d) (1982) provides that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

employers who take an uncompromising position on a particular issue¹¹⁴ and who cannot advance legitimate business reasons for doing so.¹¹⁵ This view poses problems for the employer who does not want to agree to a checkoff arrangement. Unlike wages and benefits, the checkoff is an either/or proposition, over which there is little or no room for compromise. Additionally, apart from cost and administrative inconvenience, which are relatively insignificant, the checkoff implicates none of the usual business or operational concerns that employers use to justify a bargaining position.¹¹⁶

In drawing the line between "hard bargaining" and "bad faith bargaining" over the checkoff, the Board and the courts look both at *how* the employer bargains over this subject and *why* it refuses to agree to a checkoff, with the focus being on the "overall pattern of conduct."¹¹⁷ First, with respect to the "how," an employer must at least be willing to consider all of the union's checkoff proposals and alternative ways for collecting dues. For example, in *McLane Co.*¹¹⁸ the union inquired if the company might accept some modification in the wording of the provision, but the company said it would not agree to a checkoff regardless of the form or language. Although this statement was probably a realistic reflection of the employer's unalterable opposition to the principle of the checkoff, the Board found it to be evidence that the company was not bargaining with "an open mind."¹¹⁹ Conversely, in *Cone Mills Corp.*¹²⁰ the Board was favorably impressed with the company's willingness to consider alternative ways of collecting dues, even though the administrative law judge ("ALJ") had dismissed these alternatives as being totally unrealistic.¹²¹

NLRB v. Reed & Prince Manufacturing,¹²² provides another example of how an employer's "bargaining" over the checkoff can fail to meet the test of "good faith." The employer's position was to insist that the union waive the right to ever request a checkoff at any time in the future, but the court held that the waiver would have been of such duration as to limit the union

114. *E.g.*, *Borg-Warner Controls*, 94 N.L.R.B. 112, 116 (1951) (intransigence on checkoff among other issues was "further evidence of [the employer's] intention to avoid coming to any agreement at all with the Union").

115. *Roanoke Iron & Bridge Works, Inc.*, 160 N.L.R.B. 175, 181 (1966) (employer did not bargain in good faith on checkoff because reasons were not "what appear[ed] to him to be sound considerations of business . . . judgment"), *enforced sub nom.* *United Steelworkers v. NLRB*, 390 F.2d 846, 852 n.11 (D.C. Cir. 1967) (but also denying that "business purposes are the only watchword for good faith"), *cert. denied*, 391 U.S. 904 (1968).

116. *See supra* notes 27-32.

117. *Magic Chef, Inc.*, 286 N.L.R.B. No. 33, slip op. at 19, 130 L.R.R.M. (BNA) 1027 (Sept. 30, 1987).

118. 166 N.L.R.B. 1036 (1967).

119. *Id.* at 1042.

120. 169 N.L.R.B. 449 (1968), *order enforced in part and denied in part*, 413 F.2d 445 (4th Cir. 1969).

121. *Id.*

122. 118 F.2d 874 (1st Cir. 1941), *cert. denied*, 313 U.S. 595 (1941).

in its role as the employees' exclusive representative.¹²³ In a later case,¹²⁴ the same company asserted that the checkoff was not a mandatory subject of bargaining and that even if it were, the company had legitimate reasons for refusing to agree to it. The Board and the court, however, concluded that the employer's mistaken position as to its duty to bargain foreclosed its ability to negotiate in good faith over the checkoff.¹²⁵

Similarly, there are limits on the employer's legitimate bargaining tactics involving the checkoff. In *Magic Chef, Inc.*,¹²⁶ the Board recognized that an employer may use the checkoff as a bargaining chip, provided that there is evidence of some actual willingness to agree to the checkoff if the union will make other economic concessions. Such evidence was lacking in that case, and the Board thus concluded that the employer's opposition was merely intended to frustrate agreement and precipitate a strike.

In addition to how the employer conducts its bargaining, the second factor relevant to the question of "good faith" is the employer's reasons for refusing to agree to a checkoff. For example, in *Kayser-Roth Hosiery Co.*,¹²⁷ at various times during the bargaining period the employer advanced every conceivable reason for refusing to agree to a checkoff. When the union effectively countered or responded to these objections, the employer's ultimate fall-back position was that a checkoff was against "company policy."¹²⁸ In addition to faulting the employer for constantly changing the grounds for its objection to a checkoff, the Board also disallowed the "policy" argument, stating that the argument had the effect of simply foreclosing all meaningful discussion of the issue.¹²⁹

Most employers do not even attempt to justify their position by reference to cost or administrative inconvenience,¹³⁰ and even when these reasons have

123. *Id.* at 883 (the court stated that "[s]uch a provision would have tied the hands of the Union for all time to come and thus would have impaired its efficacy as a collective bargaining agency").

124. *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

125. *Id.* at 136 (the court stated, "an employer who takes the erroneous position that a particular subject matter is not bargainable 'can hardly approach the discussion of this subject with an open mind and a willingness to reach an agreement'").

126. 286 N.L.R.B. No. 33, 130 L.R.R.M. (BNA) 1027 (Sept. 30, 1987).

127. 176 N.L.R.B. 999 (1969), *enforced*, 430 F.2d 701 (6th Cir. 1970).

128. *Id.* at 1004.

129. *Id.*

130. *See, e.g., United Steelworkers v. NLRB (Roanoke Iron & Bridge Works, Inc.)*, 390 F.2d 846, 848 (D.C. Cir. 1967) (employer stated that "as a matter of 'principle' no cooperation on dues collection would be given" as its only basis for opposing a checkoff provision), *cert. denied*, 391 U.S. 904 (1968); *United Steelworkers v. NLRB (H.K. Porter Co.)*, 363 F.2d 272, 275 (D.C. Cir. 1966) (reason given for denying union's request for checkoff provision was that employer was "not going to aid and comfort the union"), *cert. denied*, 385 U.S. 1036 (1967); *Cone Mills Corp.*, 169 N.L.R.B. 449, 457 (1968) (employer refused to grant the checkoff because "it was not in the best interest of the Company"), *order enforced in part and denied in part*, 413 F.2d 445 (4th Cir. 1969); *Flowers Baking Co.*, 161 N.L.R.B. 1429, 1439 (1966)

been raised, "bad faith" bargaining has still been found on other grounds.¹³¹ Rather, the most common reason, though variously phrased, derives from the disinclination to become involved in what the employer regards as the "union's business." As one employer explained it, "the Union performed a service and, if it continued to perform that service satisfactorily, it would have no problem collecting its dues. It was not the business of the Company to collect the union dues."¹³²

An employer who disdains doing the union's business but who honors payroll deductions for other purposes faces a possible claim of discrimination, from which bad faith can be inferred. For example, in *Farmers Co-Operative Gin Association*¹³³ the employer refused to agree to a checkoff even though it honored payroll deductions in repayment of loans to banks and in payment to various merchants for goods purchased on credit. Although the ALJ said that the employer's claim that the collection of dues was the union's business was, on its face, a "valid position,"¹³⁴ it still had to be made in good faith. The ALJ then tartly observed that the collection of bank loans and credit sales were also the business of the bank and the merchant, and yet the employer cooperated with them.¹³⁵ The ALJ inferred the employer's lack of good faith from the fact of this discrimination against the union and the employees' union activities.¹³⁶

The inference, however, is neither inexorable nor necessarily compelling. There have been a number of cases where the employer honored payroll deductions for a variety of purposes but nevertheless bargained successfully

(employer "adamantly refused to agree to a voluntary checkoff of union dues and initiation fees, not because it was burdensome or inconvenient to do so, but on the sole ground that 'the principle of deducting the Union's dues . . . does not appeal to us' ").

131. See, e.g., *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 136 (1st Cir.) (although the employer stated that administration of a checkoff provision would be too much of a bookkeeping burden, the court found the employer had bargained in bad faith), *cert. denied*, 346 U.S. 887 (1953); *McLane Co.*, 166 N.L.R.B. 1036, 1038, 1042 (1967) (the Board found that the employer had negotiated with the union in bad faith concerning checkoff even though the employer cited a number of financial and administrative reasons for its opposition to checkoff).

132. *General Asbestos & Rubber Div., Raybestos-Manhattan, Inc.*, 168 N.L.R.B. 396, 406 (1967); see also *NLRB v. General Tire & Rubber Co.*, 326 F.2d 832, 833 (5th Cir. 1964) ("The Company repeatedly stated that it would not agree to a dues check-off clause, contending that the collection of dues was a union obligation"); *Jeffrey Stone Co.*, 173 N.L.R.B. 11, 15 (1968) (employer's reason for failure to bargain over a checkoff clause, that it was "unwilling to perform clerical services for the Union," was nondiscriminatory and the employer did not commit an unfair labor practice); *McGraw-Edison Co.*, 172 N.L.R.B. 1604, 1609 (1968) (employer rejected union's request for checkoff on basis that it was union's business, not the company's, to collect dues).

133. 161 N.L.R.B. 887 (1966).

134. *Id.* at 902.

135. *Id.* at 903.

136. *Id.* See also *Alba-Waldensian, Inc.*, 167 N.L.R.B. 695, 716 (1967) (employer claimed that if it agreed to a checkoff it would be blamed for employees' shrinkage of take-home pay, but employer honored payroll deductions for other purposes without suffering that consequence).

against a union dues checkoff provision.¹³⁷ Although the Board and the courts have not attempted to explain it, employer "discrimination" in this regard could be justified on a number of tangible albeit noneconomic grounds. The checkoff may embroil the employer in disputes between the union and its dissident members, with the employer being potentially guilty of unfair labor practice charges regardless of whether it honors a checkoff revocation or not,¹³⁸ or an employer may have legitimate reasons for not wanting to know which of its employees are union members.¹³⁹ These considerations are simply lacking with respect to withholding wages for charitable or commercial credit payments.¹⁴⁰

3. Employer Unwillingness to Assist Union

The company advanced another controversial reason for refusing to agree to a checkoff in *H.K. Porter Co.*¹⁴¹ The company negotiator, after indicating

137. *Amalgamated Clothing Workers v. NLRB*, 432 F.2d 1341, 1342 (D.C. Cir. 1970) (company's ten year old policy of allowing only essential deductions was evidence that employer did bargain in good faith over checkoff); *General Asbestos & Rubber Div., Raybestos-Manhattan, Inc.*, 168 N.L.R.B. 396, 406 (1967) (although employer conceded that it "made numerous deductions from wages for various purposes," the employer successfully bargained against checkoff). *But cf. McGraw-Edison Co.*, 172 N.L.R.B. 1604, 1609 (1968) (although company made deductions for savings bonds and its savings and profit sharing plans, because it did not make deductions for private parties, and because union did not pursue request for checkoff, employer had not bargained in bad faith); *Cone Mills Corp.*, 169 N.L.R.B. 449, 457 (1968) ("The refusal of the checkoff of union dues while permitting it for such activities as the United Fund, the credit union and United States bond[s] proves Respondent's desire to discriminate against the representative of its employees."), *order enforced in part and denied in part*, 413 F.2d 445 (4th Cir. 1969).

138. See Kingston, *Checkoff—Does it Ever Die?*, 21 LAB. L.J. 159, 160 (1970).

139. See *American Thread Co.*, 274 N.L.R.B. 1112, 1118 (1985) (although employer stated reason for seeking discontinuance of checkoff clause was that it would not be able to ascertain identity of union members, thereby preventing harassment and favoritism, the Board found that its underlying purpose was to deter complaints and grievances—a reason proscribed by the Act—and the employer thus violated sections 8(a)(1) and 8(a)(5)); *Specialty Container Corp.*, 171 N.L.R.B. 24, 28 (1968) (employer maintained an unwillingness to assist the union in dues collection, explaining that it did not want to know which employees were union members).

140. Similarly, courts have allowed employer enforcement of no-solicitation/distribution rules against union organizing activities even when the employer also makes exceptions for various charitable solicitations. Despite the fact that this constitutes literal "discrimination" against unionization activities, the nature of the solicitation justifies disparate enforcement. See, e.g., *Restaurant Corp. v. NLRB*, 801 F.2d 1390 (D.C. Cir. 1986). The employer maintained a no-solicitation rule and two employees who violated it were fired. *Id.* at 1392. The union argued that the employer's enforcement of the rule was discriminatory because six other nonunion solicitations had been allowed during the year. The court held that the employer had not discriminated against union activity because the nonunion solicitations were less disruptive. *Id.* at 1394 (noting "instances of intra-employee generosity . . . on occasions such as birthdays or departures.")).

141. 153 N.L.R.B. 1370 (1965), *enforced sub nom. United Steelworkers v. NLRB* (Porter I), 363 F.2d 272 (D.C. Cir.), *cert. denied*, 385 U.S. 851 (1966), *later proceedings*, *United Steelworkers v. NLRB* (H.K. Porter II), 389 F.2d 295 (D.C. Cir. 1967), *on remand*, 172 N.L.R.B. 966 (1968), *enforced*, 414 F.2d 1123 (D.C. Cir. 1969), *reversed*, 397 U.S. 99 (1970). See *infra* notes 178-86 and accompanying text (discussing remedy aspect of case).

that the collection of union dues was the union's business, also stated that "he did not wish to give aid and comfort to the Union by assisting it in collecting dues."¹⁴² The trial examiner held that this statement showed that the employer had not bargained in good faith.¹⁴³ The trial examiner based this conclusion on the fact that granting recognition to the union is itself a form of "aid and comfort" and that conduct which disparages the union in the eyes of the employees is an unfair labor practice.¹⁴⁴ The Board and later the court of appeals accepted the trial examiner's ultimate conclusion that the employer's rejection of the checkoff proposal constituted an attempt to frustrate the bargaining procedure and thus violated the Act.¹⁴⁵

The examiner's reasoning regarding recognition, however, is not persuasive. Employers have an express statutory duty to recognize the employees' choice of bargaining representative,¹⁴⁶ but they also have a statutory right to refuse to agree to any particular contract term.¹⁴⁷ Moreover, a simple refusal to assist the union, when there is no duty to do so, is a far cry from active disparagement of the union in its role as a collective bargaining representative.¹⁴⁸

Equally puzzling is the trial examiner's conclusion that the employer evidenced bad faith when it suggested that the union attempt to obtain the

142. 153 N.L.R.B. at 1373. See also *Alba-Waldensian, Inc.*, 167 N.L.R.B. 695, 716 (1967) (employer "did not want to be placed in a position of appearing to the employees as assisting the Union . . . by agreeing to handle the dues deduction for it" and the Board found this adamant stand against the checkoff to be evidence of bad faith).

143. 153 N.L.R.B. at 1374 (examiner stated that employer's position "evidences an attitude inconsistent with the obligation imposed upon an employer by the Act").

144. *Id.*

145. *Id.* at 1370, 1373; *United Steelworkers v. NLRB*, 363 F.2d 272, 276 (D.C. Cir.), *cert. denied*, 385 U.S. 851 (1966).

146. 29 U.S.C. § 159(a) (1982). This section provides in pertinent part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining

Id.

147. Section 8(d), 29 U.S.C. § 158(d) (1982) (duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession"). The trial examiner recognized this, but nevertheless deduced from the employer's refusal to agree, an intent to make the bargaining fail, which he concluded was a violation of the duty to bargain in "good faith" imposed by section 8(d). *H.K. Porter Co.*, 153 N.L.R.B. at 1373.

148. On appeal, Judge Miller, in his dissent, dealt with the trial examiner's reasoning on a slightly different basis:

He confused the union with its members and erroneously thought an employer is somehow required to avoid any act which may disparage or discredit a union in the eyes of the employees. The Act is for the benefit of employees and not unions and, as Mr. Justice Rutledge said, "Nothing in the Act requires an employer to maintain a union's prestige"

United Steelworkers v. NLRB (Porter I), 363 F.2d 272, 280 (D.C. Cir. 1966) (Miller, J., dissenting) (quoting *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 398 (1945) (Rutledge, J., concurring in part)), *cert. denied*, 385 U.S. 1036 (1967).

checkoff provision through economic action rather than by filing an unfair labor practice charge.¹⁴⁹ The trial examiner found the employer's position to be contrary to the Act's policy of promoting economic peace. But the trial examiner overlooked the fact that notwithstanding the general aim of avoiding strikes through collective bargaining, the central premise of the Act is that when the parties cannot agree on a term, its inclusion or exclusion in the contract remains a function of economic strength. Furthermore, an employer commits no unfair labor practice when it exploits its economic strength in this context.¹⁵⁰ As the court put it in *Atlas Metal Parts Co. v. NLRB*,¹⁵¹ "[i]t is not illegal for a party to take advantage of a shift in economic strength in a bona fide attempt to obtain agreement on original proposals seen as furthering its best interest" including in that case an opposition to the checkoff.¹⁵²

Subsequently, in *Roanoke Iron & Bridge Works, Inc.*,¹⁵³ another employer also refused to agree to a checkoff as a matter of principle. However, after reviewing the prior election campaign, the Board concluded that the employer equated the checkoff with the union's survival and thus its refusal to agree to the checkoff was intended to fatally weaken the union.¹⁵⁴ The Board found this to constitute bad faith bargaining and the court of appeals affirmed its order. The court concluded that the employer's attitude and the manifestation of that attitude in the form of a refusal to agree to a checkoff was inconsistent with the fundamental statutory duty to at least concede the rightful existence of a certified union.¹⁵⁵ In a vigorous dissent, Judge, and

149. 153 N.L.R.B. at 1373.

150. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-89 (1960) (use of economic weapons part of labor-management relations).

151. 660 F.2d 304 (7th Cir. 1981).

152. *Id.* at 309. See also *NLRB v. Alva Allen Indus., Inc.*, 369 F.2d 310, 318 (8th Cir. 1966) (adamant refusal to agree to a union security provision based on economic strength); *O'Malley Lumber Co.*, 234 N.L.R.B. 1171, 1179 (1978) (where an employer's economic strength increases through withstanding a strike, "it is not unlawful for the employer to use its new-found strength to secure contract terms that it deems beneficial"). But cf. *Flowers Baking Co.*, 169 N.L.R.B. 738, 738 n.2 (1968) (employer maintained a firm position after surviving an unsuccessful strike which the Board found to be evidence of an intent to make bargaining futile and "to disparage and undermine the Union"), *enforced*, 418 F.2d 244 (5th Cir. 1969).

153. 160 N.L.R.B. 175 (1966), *enforced sub nom.* *United Steelworkers v. NLRB*, 390 F.2d 846 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 904 (1968).

154. *Id.* at 181 (employer's refusal "was grounded in the Company's belief that if it refused the checkoff the Union would suffer and would probably again leave the scene").

155. *Id.* at 850-52. But see *American Oil Co.*, 164 N.L.R.B. 36 (1967), where, in the absence of any other evidence indicating an attempt to frustrate agreement, the Board held that when the employer refused to "agree to [a] checkoff because it did not want to aid the Association," this constituted "a legitimate reason." *Id.* at 39. The Board reached this conclusion, moreover, in spite of the fact that the employer's position on the checkoff was but a part of its broader view that unionization itself was inappropriate for professional employees, a position which comes very close to what some might regard as a repudiation of a fundamental duty under the statute to at least recognize a union's legitimacy as a collective bargaining representative. *Id.*

later Supreme Court Chief Justice, Burger regarded the employer's refusal to agree to a checkoff, even if it was for the purpose of weakening the union's bargaining strength, as a legitimate exercise of economic power. In doing so, Burger noted "the accepted reality that collective bargaining is more a practical—even brutal—economic confrontation than a statesmanlike minuet."¹⁵⁶

Although *H.K. Porter* and *Roanoke Iron* suggest that a desire to weaken the union or even not aid it will be evidence of a bad faith refusal to agree to a checkoff, that conclusion is severely undermined by *Cone Mills Corp.*¹⁵⁷ In that case, the company had refused to agree to a checkoff "on the ground that it was not in the best interest of the Company" to do so.¹⁵⁸ When pressed, the company admitted that based on its prior experience, it felt that this union would be "less trouble" (cause fewer strikes) if it did not have a checkoff.¹⁵⁹ During negotiations, the company spokesman said that "he was not going to grant the checkoff to help the Union build a 'strong' Union."¹⁶⁰ The company admitted that again during the unfair labor practice hearings, and also advanced a number of other reasons for refusing to agree to this term.¹⁶¹

The ALJ found the refusal to be an unfair labor practice, largely because of the employer's selective and discriminatory opposition to payroll deductions. The Board reversed, however, admitting that the employer had "vague and specious reasons for declining the Union's proposals,"¹⁶² and had otherwise engaged in conduct which "render[ed] suspect"¹⁶³ its bargaining position. Nevertheless, the Board cited numerous offsetting factors, to wit: there was insufficient evidence of an intent to weaken or destroy the union (apparently, the Board did not read that into the employer's desire not to make the union "strong"); the union had existed since 1955 without a checkoff; agreement had been reached on other items;¹⁶⁴ and the company

156. 390 F.2d at 857 (Burger, J., dissenting).

157. 169 N.L.R.B. 449 (1968), *order enforced in part and denied in part*, 413 F.2d 445 (4th Cir. 1969).

158. *Id.* at 454.

159. *Id.*

160. *Id.* at 455.

161. The company argued that unions which collect their own dues are more responsive to their members, that checkoffs create ill will among the employees and alienate them from their union, and that this was an internal union matter. *Id.* The ALJ rejected most of these reasons. He said that the union responsiveness argument "concerned a matter exclusively between the member and his union and of no concern to [the employer]." *Id.* at 457. Of course, the same could be said for the matter of dues collection. With respect to the allegation of intra-employee ill will, the ALJ said that there was no evidence of that with respect to the other items for which the employer honored a payroll deductions. *Id.*

162. 169 N.L.R.B. at 449.

163. *Id.*

164. *Id.* at 449. *See also* American Oil Co., 164 N.L.R.B. 36, 39 (1967) (willingness to make concessions on other matters negated the inference that a refusal to agree to the checkoff was intended to frustrate reaching an agreement).

expressed some willingness to agree to alternative ways of collecting dues (even though the ALJ had found each of these to be totally impractical).¹⁶⁵ The Board simply ignored the discriminatory aspects of the company position on payroll deductions.

Cone Mills Corp. cannot be reconciled with *H.K. Porter* and *Roanoke Iron & Bridge*. All one can say is that an employer runs a risk when it refuses to agree to a checkoff and states that its position is based on the prospect of adversely affecting the union's strength and effectiveness as a collective bargaining representative. The risk is that its position may be cited as evidence of bad faith, but only if the Board further concludes that the employer took the position for the purpose of avoiding or frustrating the bargaining process altogether.¹⁶⁶ Given the unpredictability of that conclusion, employers would be well advised not to adopt this bargaining position.

4. *Employee Free Choice*

In opposing union security agreements generally, employers often attempt to justify their position by reference to a concern for preserving the "free choice" of the individual employees. In *Atlas Metal Parts v. NLRB*,¹⁶⁷ the employer suggested a "freedom of choice" proposal in lieu of both the union security and checkoff provision that had been included in prior contracts. The Board adopted what amounted to a "once in, always in" approach. It also characterized the company's substitute proposal as being "unreasoned, redundant, and inflammatory" and as "predictably unacceptable" to the union.¹⁶⁸ The court of appeals disagreed, however, rejecting the notion that once an employer agrees to union security and a checkoff, it is bound to continue to agree to it in subsequent contracts. The court implicitly accepted as legitimate the employer's reason for wanting to eliminate these contract terms, namely "so that employees would have a free choice concerning Union membership."¹⁶⁹ That explanation makes sense with respect to the union security issue, but because the Taft-Hartley Act itself guarantees employee free choice with respect to the checkoff, it is not clear why this concern justifies an employer's refusal to agree to such a provision.

165. 169 N.L.R.B. at 449.

166. Something more than mere adamant opposition to a checkoff is required in order to justify a conclusion that the employer was motivated by a desire to frustrate agreement. See *Stevenson Brick & Block Co.*, 160 N.L.R.B. 198, 209-10 (1966) (conclusory assertion that the employer was so motivated), *enforcement denied*, 393 F.2d 234 (4th Cir. 1968).

167. 252 N.L.R.B. 205 (1980), *enforcement denied*, 660 F.2d 304 (7th Cir. 1981).

168. *Id.* at 220-21.

169. 660 F.2d 304, 308 n.3 (7th Cir. 1981). "Free choice" was also asserted as a justification in *McLane Co.*, 166 N.L.R.B. 1036, 1038 (1967). It was not explicitly rejected as a legitimate justification, and the employer was found to have bargained in bad faith for other reasons. *Id.* at 1042.

5. Proof of Discrimination

The final reason that employers have advanced for refusing to agree to a checkoff is a somewhat unusual one. In *Markle Manufacturing Co.*,¹⁷⁰ the company had a checkoff agreement with the union. During the term of this contract, however, the company had also been subjected to a large number of unfair labor practice charges and contract grievances alleging discrimination against union members. Essential to such a claim is proof that the employer knew or had reason to know of the adversely affected employee's union membership.¹⁷¹ Apparently, the union had established this knowledge by reference to the fact that the employer was checking off the dues of union members. To eliminate such knowledge, and thus free itself from these claims of discrimination, the company proposed to eliminate the checkoff arrangement.¹⁷²

The ALJ found this to be an "eminently reasonable position,"¹⁷³ given the union's litigious propensities. The Board, however, said that it was tantamount to a withdrawal of an existing term or condition of employment because the employees had exercised their section 7 rights. This retaliation, coupled with the fact that the employer "implicitly" conditioned continuation of the checkoff on a waiver of these rights, led the Board to find that the employer had bargained in bad faith.¹⁷⁴

Subsequently, in *American Thread Co.*,¹⁷⁵ another employer asserted exactly the same reason for opposing any further checkoff arrangements. The ALJ found this to be an unfair labor practice, but the Board disagreed and expressly overruled *Markle*. In a rare instance of reexamining the factual findings of a prior case, the Board concluded that there was no evidentiary basis for concluding that the employer in *Markle* had "implicitly" offered to continue the checkoff if the union would agree not to file discrimination claims.¹⁷⁶ Presumably, if an employer did in fact make such an offer, it would still be an unfair labor practice. The Board did not specifically refer to the retaliation thesis of *Markle*, although it presumably rejected it as a matter of law. In any event, it quoted favorably the *Markle* ALJ's observation that the company's bargaining position was "eminently reasonable."¹⁷⁷

In sum, one can only say that bargaining over the checkoff is fraught with perils for the employer who desires not to agree to such a provision. The danger, however, may be more apparent than real. Assuming that the employer's state of mind is not what the Board and the courts think it ought

170. 239 N.L.R.B. 1353 (1979).

171. See *Leyendecker Paving, Inc.*, 247 N.L.R.B. 28, 38-39 (1980) (insufficient proof of layoff in retaliation for union activity).

172. *Markle Mfg.*, 239 N.L.R.B. at 1364.

173. *Id.*

174. *Id.* at 1355.

175. 274 N.L.R.B. 1112 (1985).

176. *Id.* at 1113.

177. *American Thread*, 274 N.L.R.B. at 1113 (citing *Markle*, 239 N.L.R.B. at 1364).

to be, a meaningful remedy for such bad motives is virtually nonexistent.

6. *Difficulties with Remedies*

In *H.K. Porter Co.*, the court of appeals upheld the Board's finding that the company had bargained in bad faith, but was ambivalent about the remedy.¹⁷⁸ In the bargaining that followed the decision, the parties again came to impasse over the checkoff issue. The company's response to the union's renewed demand for a checkoff was to suggest the possibility of making a table in the payroll office available to the union for dues collection purposes. The union, however, took the position that the court decree required the company to actually include a checkoff provision in the contract.

In a decision clarifying its original decree,¹⁷⁹ the court of appeals began by recognizing an inherent conflict between two statutory policies. On the one hand, it noted that the Act is grounded on the premise of freedom of contract, the terms of which are determined by the parties rather than the Board.¹⁸⁰ On the other hand, however, the court noted that the Act also guarantees a "meaningful" right of collective bargaining, which was intended to be enforced through the Board's broad remedial powers.¹⁸¹ After balancing these two policies, the court concluded that ordering a recalcitrant employer to grant a checkoff was, in certain instances, the only way to guarantee the right of collective bargaining.¹⁸² At the same time, it concluded that such a requirement was at most a minor intrusion on freedom of contract, because

178. *H.K. Porter Co.*, 153 N.L.R.B. 1370 (1965), *enforced sub nom.* *United Steelworkers v. NLRB* (Porter I), 363 F.2d 272 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 851 (1966), *later proceedings*, *United Steelworkers v. NLRB* (H.K. Porter II), 389 F.2d 295 (D.C. Cir. 1967), *on remand*, 172 N.L.R.B. 966 (1968), *enforced*, 414 F.2d 1123 (D.C. Cir. 1969), *reversed*, 397 U.S. 99 (1970). See *supra* note 141 and accompanying text. The ALJ originally indicated that the employer would be required to resume negotiations and bargain in good faith on the checkoff issue—presumably, by advancing some reason for refusing to accept it other than a desire not to aid the union—but that the employer would not be required to agree to a checkoff arrangement. 153 N.L.R.B. at 1373 n.9. The court of appeals expressly rejected that approach. "To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute." 363 F.2d at 276 n.16. The court, however, also indicated that it was not necessary for the Board's order to specifically require the company to withdraw its objections to either the checkoff or the union's alternative of collecting dues in non-working time in non-working areas—which would be tantamount to requiring it to agree to such terms. Rather, the court felt that enforcement of the Board order, which merely required the employer to cease and desist from refusing to bargain with the union, should be enforced through contempt proceedings. *Id.*

179. *United Steelworkers v. NLRB* (H.K. Porter II), 389 F.2d 295 (D.C. Cir. 1967). The union had moved for a clarification of the court's decree earlier, but it had been denied. The union then asked the NLRB to initiate contempt proceedings against the company, but this too was refused. The union then again asked the court for a clarification of the decree, and this time the court acceded to the request. *Id.* at 298.

180. *Id.* at 300.

181. *Id.* at 300-01.

182. *Id.* at 301.

it is of such little consequence to the employer.¹⁸³ The court thus remanded the case back to the NLRB, which entered an order requiring the company to agree to a checkoff.¹⁸⁴

The United States Supreme Court reversed.¹⁸⁵ The Court held that section 8(d) not only prohibits the Board from relying on a refusal to agree as the sole evidence of bad faith bargaining, it also limits the Board's power to impose a substantive term as a remedy to bad faith bargaining that has been established on other bases.¹⁸⁶

As a consequence of *H.K. Porter*, an employer may apparently refuse to agree to a checkoff provision for what the Board regards as an illegitimate reason, and thus be guilty of an unfair labor practice, but still avoid having this provision imposed on it by way of remedy. The courts have yet to address the question of whether such an employer could be found guilty of contempt, but *H.K. Porter* would presumably preclude that remedy as well. In sum, the checkoff cases have revealed a fatal flaw in the law of collective bargaining—the existence of a “wrong” without any meaningful “remedy.”

While “state of mind” violations of the section 8(a)(5) duty to bargain over checkoffs are both difficult to establish and impossible to remedy, the same is not true with respect to so-called “per se” violations. During the term of a collective bargaining agreement, employer abrogation of the checkoff provision will constitute a breach of the contract. It will also be a per se violation of the section 8(a)(5) duty to bargain collectively as defined in section 8(d) to include the duty to continue “in full force and effect . . . all the terms and conditions of the existing contract.”¹⁸⁷ Even if the collective

183. *Id.* at 302.

184. 172 N.L.R.B. 966 (1968), *enforced*, 414 F.2d 1123 (D.C. Cir. 1969), *reversed*, 397 U.S. 99 (1970).

185. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). *See generally* Note, *Labor Law—NLRB May Not Order Employer to Include Checkoff Provision in Collective Bargaining Agreement as Remedy for His Refusal to Bargain*, 23 VAND. L. REV. 874 (1970) (discussing *H.K. Porter* holding that order to bargain in good faith within remedial authority of Board, but it cannot compel either party to agree to any particular substantive provision in the collective bargaining agreement).

186. 397 U.S. at 107-08.

187. 29 U.S.C. § 158(d) (1982). *See International Distrib. Centers, Inc.*, 281 N.L.R.B. 742, 743 (1986) (fact that employer was in a “precarious financial condition” was no excuse for failure to remit dues as required by the contract). However, in the absence of a contract provision obligating an employer to honor checkoff authorizations, the unilateral discontinuance of a long-established practice of doing so may or may not be a violation of section 8(a)(5). In *Creutz Plating Corp.*, 172 N.L.R.B. 1 (1968), the contract contained a union security clause but no checkoff provision. The employer had honored checkoff authorizations for many years, but suddenly discontinued the practice without bargaining. The Board held that “[w]hile such change was proper and not violative of the Act insofar as it affected employees who had not signed authorizations for such deductions, it was violative of Respondent’s duty to bargain with respect to the employees who had signed authorizations.” *Id.* at 11. However, the Board also emphasized that the timing and other circumstances indicated that the employer’s purpose was to undermine the union and stated that it was thus unnecessary to decide if the employer could have done it otherwise. *Id.* at 11 n.26.

bargaining agreement is itself silent on the question of revocation, the Board has held that the agreement incorporates by reference the terms of the checkoff authorization, including those relating to irrevocability,¹⁸⁸ thus making the employer potentially guilty of an unfair labor practice if it honors untimely revocations.¹⁸⁹

C. The Question of Voluntariness

Voluntariness is the *sine qua non* of any valid checkoff arrangement.¹⁹⁰ It is thus an unfair labor practice for an employer to checkoff dues without prior employee assent.¹⁹¹ Moreover, it is an unfair labor practice for either the employer or the union to "coerce" an employee into signing a checkoff authorization. However, the line between illegal coercion, on the one hand, and lawful encouragement by the union or mere cooperation by the employer, on the other, is a question of fact and judgment. If the collective bargaining agreement contains a union security clause and a checkoff provision, an employer may advise employees of their duty to pay money under the union security clause and of the availability of the checkoff as a means of satisfying that duty.¹⁹² But the employer cannot expressly or implicitly indicate that signing a checkoff is obligatory.¹⁹³ Conversely, an employer may respond to

188. *Shen-Mar Food Prod., Inc.*, 221 N.L.R.B. 1329, 1330 (1976).

189. The question of whether there is a section 8(a)(5) duty to continue the checkoff in effect following the termination of the collective bargaining agreement will be dealt with in Part D, *infra*.

190. *See, e.g., Armco, Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987) (dues checkoff provision must be voluntary choice of employees); *NLRB v. Atlanta Printing Specialties and Paper Products Union*, 523 F.2d 783, 787 (5th Cir. 1975) ("Congress intended to preserve the employees' freedom of choice to refrain from union membership." (citing *Felter v. Southern Pac. Co.*, 359 U.S. 326 (1959))).

191. *E.g., Guard Services, Inc.*, 134 N.L.R.B. 1753, 1759 (1961) (Board found unfair labor practice where collective bargaining agreement required employer to checkoff union dues without any authorization from employees).

192. *See, e.g., Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583, 587 (1966) (although employer solicited employees to sign union authorization and checkoff cards and warned them that they could be discharged pursuant to union security clause unless they did so, Board ruled that employer had merely advised employees of their contractual obligation and means for satisfying it). *Cf. NLRB v. Sellers*, 346 F.2d 625, 629 (9th Cir. 1965) (clerk handed checkoff authorization forms to new employees as they were hired, but no one in higher management knew about this and employees were not told that they were required to sign); *Plant & Field Serv. Corp.*, 184 N.L.R.B. 849 (1970) (checkoff authorization forms which employer distributed as a part of the hiring process, and letter employer sent employees, stated forms were voluntary).

193. *See, e.g., NLRB v. Revere Metal Art Co.*, 280 F.2d 96, 100 (2d Cir. 1960) (employees summoned to foreman's office and told they had to sign checkoff authorization forms; called "coercion in the most literal sense" by the court), *cert. denied*, 364 U.S. 894 (1960); *Mode O'Day Co.*, 280 N.L.R.B. 263, 253, 255 (1986) (illegal to include a checkoff authorization form, already filled in and dated, among the other employment forms an employee was required to sign); *Tribuiani's Detective Agency, Inc.*, 233 N.L.R.B. 1121, 1124 (1977) (illegal for supervisor to ask employees to sign checkoff authorization form); *Hope Indus., Inc.*, 198 N.L.R.B. 853, 857 (1972) (illegal to threaten loss of job unless employee signed checkoff

employee requests for information about when and how their checkoff authorizations may be rescinded, provided there are no accompanying threats or promises.¹⁹⁴

A union's actions may also be coercive and give rise to unfair labor practice charges. It cannot threaten employees with economic loss unless they sign a checkoff form,¹⁹⁵ make signing a checkoff authorization a condition to referral from a union hiring hall,¹⁹⁶ or make the checkoff the only way in which the union security obligation can be satisfied.¹⁹⁷

Another form of "involuntariness" arises when an employee has willingly signed a checkoff authorization, but the employer withholds and forwards to the union monies not covered by the terms of the authorization. Here, the issue is one of individual assent, thus the terms of the authorization rather than the terms of the collective bargaining agreement control. In one case, for example, the collective bargaining agreement authorized the checkoff of union "assessments, if any," but the checkoff authorization itself referred only to the union's "initiation fee and monthly dues."¹⁹⁸ The Board held that while a "one-time assessment" might fall within the scope of what the contract authorized, it was not within the terms of the checkoff authorization. Thus, the union and the employer illegally coerced the employees when this assessment was simply added to the amount that was being checked off.¹⁹⁹

authorization); Northern Metal Prod. Co., 171 N.L.R.B. 98, 109 (1968) (employees told they could not revoke their checkoff authorizations unless they quit); Paranite Wire & Cable Div., Essex Wire Corp., 164 N.L.R.B. 319, 323 (1967) (illegal to give employees the "impression" that they must sign a checkoff authorization).

194. See Peoples Gas Sys., Inc., 275 N.L.R.B. 505 (1985); University of Richmond, 274 N.L.R.B. 1204 (1985).

195. See, e.g., International Union of Elec. Workers, Local 601, 180 N.L.R.B. 1062 (1970) (employer threatened employees with discharge or loss of employment if they refused to sign checkoff authorization); Hunter Outdoor Prod., Inc., 176 N.L.R.B. 449 (1969) (Board ordered union and employer to jointly and severally reimburse employees, who had not given uncoerced authorization, for dues checked off for union which was not representative of an uncoerced majority of employees).

196. E.g., Bellkey Maint. Co., 270 N.L.R.B. 1049, 1051 (1984) (if individuals wanted to be referred to employer, they had to complete checkoff form which also served as referral slip to be presented at job site).

197. Local 4012, CWA (Michigan Bell Tel. Co.), 184 N.L.R.B. 166, 175 (1970) (union adopted a resolution requiring all dues to be collected by payroll deduction and employee was informed that he must sign authorization); see also Columbia Transit Corp., 246 N.L.R.B. 483, 489 (1979) (neither the union nor the employer threatened or effectuated the discharge of any employees for their failure to execute checkoff authorizations).

198. AMCAR Div., ACF Indus., 245 N.L.R.B. 339, 340 (1979), *enforced as modified sub nom.* Brotherhood of Ry. Carmen, Lodge 365 v. NLRB, 624 F.2d 819 (8th Cir. 1980).

199. *Id.* at 341. See also NLRB v. Food Fair Stores, Inc., 307 F.2d 3, 20 (3d Cir. 1962) (reimbursement ordered where employer had deducted a "strike assessment" from wages of employees who had merely authorized the checkoff of "membership dues," but no reimbursement to those employees whose authorizations referred to "monthly dues . . . and assessments"); see *supra* notes 37 and 46 and accompanying text. See also Electric Auto-Lite Co., 92 N.L.R.B.

D. The Status of Checkoff Arrangements During Contract Hiatus Periods

After a collective bargaining agreement has expired, questions arise with respect to: (1) whether an employer *can* discontinue the checkoff of union dues; and, (2) whether an employer *must* discontinue the checkoff if an employee requests it. The section 8 unfair labor practice aspects of the contract-hiatus issue are somewhat different, and even more complicated, than the section 302 aspects discussed earlier in Part II-B. These two issues are discussed separately in this section.

1. The Employer's Duty to Continue Checkoff

The employer's purported obligation to continue the checkoff derives from section 8(a)(5) of the Act. Generally speaking, if something is a mandatory subject of bargaining, an employer has a section 8(a)(5) duty to maintain the status quo with respect to that matter until it has bargained to impasse with the union over any changes.²⁰⁰ Thus, if the contract has established a certain wage rate, the employer must continue to pay that rate, even though the contract has expired, until it has bargained with the union over either a reduction or an increase. Not all contract terms involving mandatory subjects of bargaining, however, survive in that fashion. The checkoff is among the exceptions.²⁰¹

In *Bethlehem Steel Co.*,²⁰² the Board held that the employer did not violate section 8(a)(5) when, after the contract expired, it ceased to require employees

1073, 1077 (1950) (fine for not attending union meetings could not be added to the authorized amount). See generally Note, *Labor Law—Strike Assessments Not Periodic Dues*—N.L.R.B. v. Food Fair Stores, 4 B.C. IND. & COM. L. REV. 434, 434 (1963) (discussing *Food Fair Stores* and the Third Circuit's holding that assessments, even when uniformly applied to all union members, are not "periodic dues" within the meaning of sections 8(a)(3) and 8(b)(2)); Note, *Labor Law—Enforceable Union Security*, 12 OHIO ST. L.J. 297, 300 (1951) (discussing the Board's increasing acceptance of the checkoff as an enforceable union security device).

200. 29 U.S.C. § 158(a)(5) (1982). See *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (employer's unilateral changes of merit pay increase and automatic wage increase systems, and sick-leave policy, prior to impasse in bargaining violated section 8(a)(5)); *NLRB v. Wooster Div. of Borg Warner Corp.*, 356 U.S. 342, 349-50 (1958) (employer's insistence that "ballot" and "recognition" clauses be included in collective bargaining agreement violated section 8(a)(5) because clauses were only permissive, not mandatory, subjects). For further discussion of the relation between impasse and the duty to bargain, see R. GORMAN, *supra* note 4, at 445-50 (1976); Turner, *Impasse in the 'Real World' of Labor Relations: Where Does the Board Stand?*, 10 EMPLOYEE REL. L.J. 468 (1984). See *supra* notes 100 & 103 for a discussion of mandatory subjects of bargaining.

201. See generally Bosanac, *Expiration of the Collective Bargaining Agreement: Survivability of Terms and Conditions of Employment*, 4 LAB. LAW. 715, 723-26 (1988). A successor employer, thus, is also not obligated to continue to honor the checkoff obligations of the predecessor employer. *S-H Food Serv., Inc.*, 199 N.L.R.B. 95, 95 n.2 (1972) ("Checkoff, being solely a contractual obligation, did not carry over as an existing term or condition of employment.").

202. 136 N.L.R.B. 1500 (1962), *enforced sub nom.* *Industrial Union of Marine Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

to join the union and also discontinued the checkoff. With respect to requiring union membership as a condition of employment, the Board held that the statute itself allows such a requirement only if it is pursuant to a contract term satisfying the conditions of section 8(a)(3).²⁰³ When the contract expires, the employer's right and duty to impose this requirement ceases. Although the Act does not similarly limit checkoff agreements, the Board treated the checkoff as merely being the way in which the union security provision was implemented, and thus subject to the same limits with respect to the duration of the employer's duty.²⁰⁴ With respect to that duty, the Board seemed to suggest that it terminates as a matter of law with the expiration of the contract.²⁰⁵ The Board also seemed to suggest, however, that the survivability of a checkoff provision turns on how the provision is worded, by stating that "[t]he very language of the contracts links Respondent's checkoff obligation to the Union with the duration of the contracts."²⁰⁶

The Board's reasoning and conclusion were affirmed by the Third Circuit.²⁰⁷ Neither the Board's nor the court's decision made clear, however, whether the nonsurvivability of the checkoff was merely a matter of interpreting the particular language of that contract, or whether the employer's section 8(a)(5) duty terminated as a matter of law when the contract expired, regardless of what the checkoff provision said. For a time, the Board recognized that *Bethlehem Steel* left open the question of whether a checkoff provision which was not expressly tied to the term of the agreement would nevertheless automatically expire with the agreement, but found it unnecessary to resolve the question by deciding later cases on other grounds.²⁰⁸ The

203. *Id.* at 1502.

204. *Id.*

205. *Id.* See also *Tonkin Corp.*, 165 N.L.R.B. 607, 614 (1967) ("It is axiomatic that under section 8(a)(3) of the Act a union shop and dues checkoff cannot be maintained without contractual support therefor."), *enforced*, 420 F.2d 495 (9th Cir. 1969).

206. *Bethlehem Steel Co.*, 136 N.L.R.B. at 1502 (contract stated "the Company will, beginning the month in which this Agreement is signed and so long as this Agreement shall remain in effect, deduct from the pay of such Employee each month . . . his periodic Union dues for that month.").

207. *Industrial Union of Marine Workers*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). The court of appeals stated its conclusion in these terms:

The right to require union membership as a condition of employment is dependent upon a contract which meets the standards prescribed in § 8(a)(3). The checkoff is merely a means of implementing union security. Since there was no contract in existence when the company discontinued these practices, its action was in conformity with the law. . . . Moreover, the checkoff clause of the 1956 contract expressly provided that it should remain in effect only so long as the agreement was extant.

Id. at 619 (citations omitted).

208. *American Oil Co.*, 164 N.L.R.B. 36, 38 (1967) (circumstances of employer's discontinuance of checkoff neither directly showed bad faith nor supported inference of bad faith); *Standard Oil Co. of Calif., Western Operations, Inc.*, 144 N.L.R.B. 520, 521 (1963) (because checkoff clause was not tied to term of the contract the Board did not decide question whether the employer was obligated to deduct dues).

more recent cases, however, simply ignore the question as a possible limitation on the scope of *Bethlehem Steel*. As the Board put it in *Hassett Maintenance Corp.*,²⁰⁹ "it is well established that a union's right to the checkoff of dues is extinguished at the expiration of the collective-bargaining agreement creating that right."²¹⁰

The question is, why is that so?²¹¹ Certainly, the issue should not turn on the fortuitous presence or absence of language specifically linking the duration of the checkoff to the duration of the contract as a whole. The language to that effect in the *Bethlehem Steel* checkoff provision was pure surplusage. As a matter of contract law, that provision presumably would have expired with the rest of the contract on its expiration date anyway.²¹² In any event, the section 8(a)(5) duty to bargain is not predicated on the existence of a binding contract.

A better explanation for the rule lies in the other prong of the *Bethlehem Steel* analysis. Although checkoff arrangements are not expressly subject to the requirements of section 8(a)(3), the policy of linking compulsory unionism with the existence of a collective bargaining agreement is as applicable to checkoff arrangements as it is to other forms of union security. During the term of a collective bargaining agreement, there is a need for stability in the employee-union and union-employer relationships. But once that contract expires, the statutory policy is to allow the parties the maximum amount of freedom in changing those relationships.²¹³ This policy should be read into

209. 260 N.L.R.B. 1211 (1982). See also *Tampa Sheet Metal Co.*, 288 N.L.R.B. No. 43, 129 L.R.R.M. (BNA) 1188 (Mar. 31, 1988) (duty to checkoff extinguished when contract terminated); *Robbins Door & Sash Co., Inc.*, 260 N.L.R.B. 659, 659 (1982) (employer ceased deducting dues from payroll when previous contract expired); *Ortiz Funeral Home Corp.*, 250 N.L.R.B. 730, 731 n.6 (1980) (dues checkoff can be extinguished on expiration of contract); *Peerless Roofing Co.*, 247 N.L.R.B. 500, 505 (1980) (after expiration of contract, employer stopped paying over any dues to union).

210. *Hassett Maintenance Corp.*, 260 N.L.R.B. at 1211. But see *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 809 F.2d 483, 491-92 (8th Cir. 1987) (checkoff provision continues under the RLA despite NLRA authority to the contrary).

211. In *Hudson Chem. Co.*, 258 N.L.R.B. 152 (1981), the administrative law judge explained the rule by reference to the wording of section 302(c)(4), which makes a checkoff authorization irrevocable only for a year or until the termination of the collective bargaining agreement, whichever occurs first. The ALJ concluded that "[b]ecause the agreement expired, so did the checkoff authorization." *Id.* at 157. This is certainly consistent with how the Fourth Circuit read section 302 in *Anheuser-Busch, Inc. v. International Bhd. of Teamsters, Local 822*, 58 F.2d 41 (4th Cir. 1978). See *supra* note 60 and accompanying text (discussion of why a better explanation would be one that draws its essence from the law of unfair labor practices under section 8 rather than section 302).

212. In *Nolde Bros. v. Local 358, Bakery Workers Union*, 430 U.S. 243 (1977), the Supreme Court held that if an arbitration provision does not expressly state that it terminates with the remainder of the contract, then it survives the expiration of the contract. That decision, however, merely reflects the unique position that arbitration plays in federal labor law and is inapplicable to other contract terms, such as the checkoff. See *supra* notes 69-70 for a discussion of arbitration, and Part IV *infra*.

213. This policy is evident, not only in the automatic termination of the union membership

section 8(a)(5) as an exception to the general duty to maintain the status quo on mandatory subjects until bargaining has been exhausted.

The rule, however, can also be justified directly by reference to section 8(a)(5) theory. The explanation for why wage provisions survive (in the form of a section 8(a)(5) duty to maintain the status quo) while checkoff provisions do not, lies in the tenuous status of the checkoff as a mandatory subject of bargaining in the first place. The Board has explained that only "those terms and conditions established by the contract and governing the employer-employee, as opposed to the employer-union, relationship survive the contract."²¹⁴ This is a logical extension of the test for identifying mandatory subjects of bargaining.²¹⁵ Core matters, directly effecting the employer-employee relationship, such as wages, are subject to a rigorous bargaining duty. In contrast, peripheral matters, dealing primarily with the employer-union relationship, such as the checkoff, are subject to a lesser duty of bargaining—not including the duty to maintain the contractual status quo while actual bargaining is being conducted. Whatever the explanation, it is relatively clear that an employer does not commit a section 8(a)(5) violation by refusing to continue to honor checkoff authorizations during a hiatus between collective bargaining agreements.

2. *The Employer's Duty to Honor Revocations*

The second issue which arises following the expiration of a collective bargaining agreement is whether the employer violates section 8(a)(1) if it refuses to honor employee revocations that are submitted during this period. Here, the general rule is that the expiration of the collective bargaining agreement has no effect on the continued validity of the checkoff authorization itself, vis-a-vis the employer's privilege of refusing to honor attempted revocations.²¹⁶ The employee's right of revocation, rather, must be determined from the terms of the authorization itself. If the authorization is by its express terms revocable at will, then the refusal to honor a revocation will be an unfair labor practice.²¹⁷ Furthermore, if the authorization is of indefinite duration, it will likewise be regarded a revocable at will.²¹⁸ But if,

requirement, but also in the "contract bar doctrine," which requires other unions, employees, or the employer to wait until the expiration of the contract before filing a petition for an election that might lead to a change in bargaining representatives. For further discussion see C. MORRIS, *THE DEVELOPING LABOR LAW* 361 (2d ed. 1983); R. GORMAN, *supra* note 4, at 54-59.

214. Gordon L. Rayner, 251 N.L.R.B. 89, 90 (1980).

215. See *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 17, 158 (1971).

216. See *Sun Harbor Caribe, Inc.*, 237 N.L.R.B. 444, 446 (1978) (deductions were pursuant to authorizations).

217. See *Merchants Fast Motor Lines*, 171 N.L.R.B. 1444, 1445 (1968) (deduction after valid revocations violated section 8(a)(1) and 8(a)(2)).

218. See *Trico Prod. Corp.*, 238 N.L.R.B. 1306, 1309 (1978) ("authorizations which do not provide for any limitation on revocability are revocable at will").

as is usually the case, the authorization purports to limit the signor's power of revocation, then the Board will usually honor those limits.

For example, in the leading case on this issue, *Frito-Lay, Inc.*,²¹⁹ the Board saw that the checkoff authorization allowed for revocation only during two periods (including a ten-day window period prior to the expiration of the contract). It concluded from this term that the authorizations "expressly contemplated"²²⁰ the continuation of the checkoff even when no contract was in force. It further concluded that the union and the employer did not commit unfair labor practices by continuing to honor the authorizations of employees who had attempted to revoke them.

The law on this issue reflects the Board's unhealthy preoccupation with the checkoff as a form of "contract," with unfair labor practices being resolved by narrow reference to the terms of the authorization, rather than statutory policy. This approach is mistaken. When an employer refuses to honor a checkoff revocation, the unfair labor practice issue is whether the employer has violated the employee's section 7 right to refrain from union-related activities. More specifically, the issue is whether the employee has *waived* that section 7 right by signing a checkoff form which states that the authorization is irrevocable except during certain designated periods. When the issue is stated in those terms, the answer becomes fairly obvious.

Individual waivers of statutory rights are not favored in federal labor law.²²¹ Indeed, where it would defeat the underlying purposes of the Act, an individual waiver may be given no effect at all as a defense to employer and union unfair labor practice charges.²²² For example, in *Pattern Makers' League v. NLRB*,²²³ the Supreme Court held that an employee has a section 7 right to resign from the union even though the employee, by becoming a member, implicitly promised not to resign during a strike or lockout. This was because the Court found "union restrictions on the right to resign to

219. 243 N.L.R.B. 137 (1979).

220. *Id.* at 139 (emphasis in original). See also *American Nurses' Ass'n*, 250 N.L.R.B. 1324, 1331 (1980) (parties did not intend to allow revocations during contract hiatus).

221. *Cf. Montgomery Ward & Co., Inc.*, 254 N.L.R.B. 826, 831 (1981). Here, the Board narrowly construed an alleged waiver of an employee's "*Weingarten* rights," first recognized in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), to have a union representative present at any interview required by the employer which the employee reasonably believes could result in disciplinary action. The alleged waivers were ineffective because the employer had threatened the employees with dire consequences if they insisted on their rights to a representative. 254 N.L.R.B. at 831. Similarly, in *Southwestern Bell Tel. Co.*, 227 N.L.R.B. 1223 (1977), the employees had not knowingly and voluntarily waived their *Weingarten* rights. In response to their request for a representative, the employer told employees that higher management would have to be called in with worse consequences for the employees. *Id.* at 1223 (Board will "carefully scrutinize any claim that employees have waived their guaranteed [*Weingarten*] right").

222. *Cf. J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944). In *J.I. Case*, the Court established the principle that each individual employment contract is subsidiary to, and may not waive any benefit of, the collective bargaining agreement between the employer and the union. *Id.*

223. 473 U.S. 95 (1985).

be inconsistent with the policy of voluntary unionism implicit in § 8(a)(3)."²²⁴

Similarly, the fact that a checkoff authorization purports to limit the right of revocation to two specific times is irrelevant to the question of whether an additional right nevertheless exists under section 8. Rather, the very same policy of voluntary unionism compels the conclusion that at the termination of a contract, employees should have the opportunity to reevaluate their support for the union, free from any "contractual" constraints to the contrary. Thus, regardless of whether it is the direct imposition of union "membership" as a condition of employment following the expiration of the contract, or a checkoff authorization that the employee cannot revoke during this period (which amounts to the same thing), these devices should be considered illegal.

This is *particularly* true when the two devices were initially used in tandem, with the union security provision imposing the duty to become a union "member" and the checkoff authorization being used by the employee *merely* as a convenient way of discharging that duty. The section 8(a)(3) proviso requires that the union security provision duty, to be a union "member," terminate with the expiration of the contract; it would totally defeat the purpose of the proviso to then allow the checkoff to serve as an additional source of a duty to remain a "member" of the union during this period.²²⁵

Finally, it should be recalled that the Board has used the section 8(a)(3) policy of freedom of choice to limit the section 8(a)(5) duty to not change terms and conditions of employment until bargaining is exhausted.²²⁶ It would coalesce this body of law into a coherent whole for the Board to use that same policy to define the employer's section 8(a)(1) duty not to coerce employees.

E. The Effect of an Employee's Resignation From the Union on the Power to Revoke a Checkoff Authorization

Despite the fact that it is partially wrong, the law with respect to the effect of a contract hiatus on checkoff authorizations has been relatively stable. That is not the case with respect to the question of the legal effect of a resignation from membership upon the continued irrevocability of a checkoff authorization. Although the Board has consistently regarded this as primarily a matter of "contract" (e.g., the checkoff authorization) interpretation, it has taken conflicting positions on how an authorization should be construed.

224. *Id.* at 104.

225. See *Lowell Corrugated Container Corp.*, 177 N.L.R.B. 169, 173 (1969) (continuing to honor a checkoff authorization after the contract has expired is an unfair labor practice, but only with respect to employees who have attempted to revoke); cf. *NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52, 55-56 (2d Cir.) (holding that a checkoff authorization becomes revocable once the union's authority to negotiate union security provision has been rescinded), *cert. denied*, 389 U.S. 843 (1967).

226. See *supra* notes 202-07 (discussing *Bethlehem Steel*).

Initially, the Board held that an employee's resignation as a member of the union had no effect on a checkoff authorization that was otherwise revocable only at certain times. In *Shen-Mar Food Products, Inc.*,²²⁷ the collective bargaining agreement obligated the employer "to checkoff from the pay of its employees, *who are members of the Union*, the regular monthly dues and initiation fees."²²⁸ The agreement also provided that the union would furnish the proper authorizations to the employer, and the authorizations in question were irrevocable for the periods allowed by section 302(c)(4).

The Board held that the collective bargaining agreement incorporated the terms of the checkoff authorizations, including their irrevocability except at certain times, and that the agreement's reference to employees "who are members of the union" was "language of convenience rather than limitation."²²⁹ The Board thus found that the employer violated the section 8(a)(5) duty to bargain, as defined in section 8(d) to include the duty to abide by the terms of the contract, when it honored the revocations of employees who had resigned from the union.²³⁰

Subsequently, in *San Diego County District Council of Carpenters (Campbell Industries)*,²³¹ which was the companion case to *Frito-Lay, Inc.*,²³² the Board held that a resignation from the union could operate to terminate a checkoff authorization. The Board cited the terms of the authorization, which stated that it was given "in consideration of the benefits received and to be received by me as a result of my membership in the Union."²³³ Because of this authorization language, the Board ruled "that an effective resignation from the Local Union also revoked the checkoff authorization by operation of law."²³⁴ The Board distinguished *Frito-Lay*, which had involved resignations as well as a contract hiatus, on the grounds that the authorizations there were not expressly based on union membership.

Member Murphy's dissent argued that the "consideration" language was without legal significance because most, if not all, checkoffs are implicitly granted in return for the benefits of union membership anyway.²³⁵ "Con-

227. 221 N.L.R.B. 1329 (1976), *enforced*, 557 F.2d 396 (4th Cir. 1977).

228. *Id.* at 1329 (emphasis added).

229. *Id.* at 1330.

230. *Id.* The Board also apparently affirmed the ALJ's finding that the employer had violated section 8(a)(1) by honoring the revocations, in that its action "interfere[d] in the relationship of employees and their representative and constitute[d] an unlawful infringement upon the Section 7 rights of employees." *Id.* at 1329. This is an ironic conclusion given the fact that section 7 expressly gives employees the right to refrain from union activity.

231. *San Diego County Dist. Council of Carpenters (Campbell Indus.)*, 243 N.L.R.B. 147 (1979).

232. 243 N.L.R.B. 137 (1979). See *supra* notes 219-20 and accompanying text for a discussion of *Frito Lay* in connection with the effect of the expiration of the contract upon the employee's right to revoke.

233. *Campbell Indus.*, 243 N.L.R.B. at 149.

234. *Id.*

235. *Id.* at 150 (Murphy, Member, dissenting).

sequently, if the majority's reasoning here is accurate, it would necessarily follow that in *every* instance resignation from a union necessarily revokes any outstanding dues checkoff."²³⁶ Subsequent cases have confirmed the logic of that observation.

Indeed, in the cases following *Campbell Industries*, the Board expanded the theory of the case to include any authorization that even mentioned "membership dues," whether the term "consideration" was used or not. For example, in *Local Lodge 2095, IAM (Eagle Signal)*,²³⁷ which has become the "name case" for the Board's quid pro quo theory, the authorization merely referred to the employee's "initiation or reinstatement fees and . . . regular monthly Union dues . . . in accordance with regular membership dues" in the union.²³⁸ In some of the cases where the Board has found resignation to effectuate revocation as a matter of law, the fact that the employees could not have intended to be merely "financial core" members reinforced the theory that the checkoff was a quid pro quo for membership. Either the collective bargaining agreement did not contemplate that form of membership²³⁹ or such a requirement would have violated a state right-to-work law.²⁴⁰ The contrary intention was present, however, in *American Nurses' Association*.²⁴¹ As later construed by the Board, "[t]he contractual provisions in that case provided for payment of an amount equivalent to

236. *Id.* (emphasis in original).

237. 268 N.L.R.B. 635 (1984).

238. *Id.* at 636. See also *Amalgamated Transit Union, Local Div. No. 1225*, 129 L.R.R.M. (BNA) 1077 (Sept. 24, 1987) (language in authorization, "as my membership dues in said Union," constituted quid pro quo for union membership and employees effectively revoked dues checkoff when they resigned from union); *Local No. 128, Int'l Union of UAW (Hobart Corp.)*, 283 N.L.R.B. 1175, 1177 (1987) (because language "as union dues" and "from me as membership dues" makes payment of dues quid pro quo for union membership, valid resignation operates to revoke dues checkoff authorization).

239. In *United Steelworkers, Local No. 7450 (Asarco Inc.)*, 246 N.L.R.B. 878 (1979), the contract had a maintenance-of-membership provision which the Board implicitly, but erroneously, construed as requiring actual rather than mere "financial core" membership. *Id.* at 882. In any event, the Board concluded from the provision that the employee's checkoff authorization was for actual membership dues, and that when such membership ended so did the authorization. *Id.* This reasoning is completely nonsensical, of course, because the *most* that any union security agreement can require of an employee is "financial core" membership. See *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988).

240. Indeed, the Board has correctly noted that in the absence of an employee right to resign from the union and simultaneously revoke the checkoff authorization, in a right-to-work state a union could accomplish indirectly through a checkoff arrangement what state law prohibits it from accomplishing directly through a union security device. *United Food Workers, Local 425 (Hudson Foods, Inc.)*, 282 N.L.R.B. 1413, 1414 n.5 (1987); *Shopmen's Local 539 (Zurn Indus.)*, 278 N.L.R.B. 149, 152 (1986). For a discussion of the relation between the checkoff and state right to work laws, see *infra* Part V of this Article, and T. HAGGARD, *supra* note 4, at 153-57.

241. 250 N.L.R.B. 1324 (1980). The Board affirmed the ALJ's order dismissing the complaint that the employer had refused to honor valid revocation of checkoff authorizations. The revocations were ineffective because they were not submitted during the ten day period specified

fees and dues *either* to the union as a member, to the union as a nonmember, or to a nonreligious, tax-exempt charitable institution.”²⁴² Since what was being checked off was not clearly related to union membership as such, a resignation from membership was found to have no effect on the irrevocability of the checkoff.²⁴³

Yet, the courts of appeals have not been receptive to the Board’s quid pro quo theory. For example, in *NLRB v. Shen-Mar Food Products*,²⁴⁴ the Fourth Circuit agreed with the Board’s original position on the issue, which had dismissed as irrelevant the inclusion of “membership” language in the authorization. More directly on point are a series of cases involving the United States Postal Service and the special checkoff provisions applicable to that employer. In *United States Postal Service (Dalton)*,²⁴⁵ the Board relied on the *Eagle Signal* line of cases and held that since the checkoff authorization specifically referred to “membership dues,” an employee’s resignation from the union also constituted a revocation of the checkoff, by operation of law.

Although under the Postal Reorganization Act²⁴⁶ the Postal Service is subject, in part, to the provisions of the NLRA, there are still some important statutory differences. The Postal Reorganization Act, for example, has its own provision regulating the checkoff, and it is worded somewhat differently. While section 302(c)(4) speaks in terms of a wage “assignment which shall not be irrevocable for a period of more than one year,”²⁴⁷ section 1205 refers to an “assignment, which shall be irrevocable for a period of not more than one year.”²⁴⁸ In *Dalton*, however, the Board found that the two provisions were essentially the same, and that there was nothing in the legislative history suggesting that “the [Postal Reorganization Act] mandates irrevocability for 1 year notwithstanding the nature of the obligation actually

in the authorization. *Id.* at 1330-31. Revocations were submitted by other employees during the hiatus between collective bargaining agreements. The ALJ ruled that the parties had not intended to provide for an escape period during a hiatus. *Id.* at 1331 (citing *Frito-Lay, Inc.*, 243 N.L.R.B. 137 (1979)). A final group of employees submitted “opt-out” forms to the employer and union which were also ineffective because the employees could not unilaterally change the terms of their authorizations and of the collective bargaining agreement. *Id.* at 1332 (citing *Cameron Iron Works, Inc.*, 235 N.L.R.B. 287 (1978)).

242. *The Hearst Corp.*, 281 N.L.R.B. 764, 766 n.15 (1986) (emphasis in original) (citing *American Nurses Ass’n*, 250 N.L.R.B. 1324 (1980)), *aff’d without opinion*, 837 F.2d 1088 (5th Cir. 1988). The dues deducted here consisted only of the membership dues of the guild and were a quid pro quo for union membership. Resignation therefore had the effect of revoking authorization. *Id.* at 766.

243. *American Nurses Ass’n*, 250 N.L.R.B. at 1331 & n.26.

244. 557 F.2d 396, 399 (4th Cir. 1977).

245. 279 N.L.R.B. 40 (1986), *enforcement denied*, 827 F.2d 548 (9th Cir. 1987).

246. Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified as amended 39 U.S.C. §§ 1201-1209 (1982)).

247. 29 U.S.C. § 186(c)(4) (1982).

248. 39 U.S.C. § 1205(b) (1982).

incurred in the authorization itself.”²⁴⁹ Apart from that, the only other novel aspect of the Board’s decision in this case was the suggestion of Member Johansen that the authorization was still valid, but that the amount to be deducted and forwarded was zero, because the employee was no longer obligated to pay dues.²⁵⁰

The Ninth Circuit Court of Appeals agreed that the statute itself does not affirmatively require that the checkoff be irrevocable for a year.²⁵¹ On the other hand, the court disagreed with the Board’s conclusion that the checkoff authorizations in *Dalton* allowed for revocation upon resignation from the union.²⁵² What was lacking, the court said, was any cogent explanation by the Board about how it reached that conclusion. The court noted that the Board merely relied on its earlier cases, especially *Campbell Industries*, the reasoning of which the court then proceeded to reject.²⁵³

The court was apparently willing to assume that the “in consideration of” language of the authorization in *Campbell Industries* created a constructive condition of exchange. That is, the employee’s duty to continue the authorization was conditioned on the employer’s return performance or tender of performance—which the court said consisted of “‘the benefits received and to be received’ as a result of union membership.”²⁵⁴ The court observed that the employer had not failed to provide these benefits; rather, the employee had unilaterally declined to accept them. Thus, the court concluded that the employee’s choice (resignation) did not excuse the employee’s duty of performance.²⁵⁵ Although the case arose under the checkoff provisions of the Postal Reorganization Act, the court was in essence rejecting the Board’s broader theory about the contractual relationship between union membership and a checkoff authorization.

249. 279 N.L.R.B. at 42 n.4.

250. *Id.* at 42 n.5. Board Member Johansen’s point was simply stated by the Board in a footnote and not in a separate opinion.

251. 827 F.2d 548, 552 (9th Cir. 1987).

252. *Id.* at 554-55.

253. *Id.* at 554 (“rule developed in *Campbell* is based on a mistaken view of contract principles”).

254. *Id.* 827 F.2d at 554 (citing San Diego County Dist. Council of Carpenters (*Campbell Indus.*), 243 N.L.R.B. 147 (1979)).

255. *Id.* at 554. As a matter of contract law, the Board would have been on firmer grounds if it had conceptualized loss of union membership as an implied-in-fact express condition subsequent of the employee’s implied promise (duty) not to revoke the authorization for a year. The consideration for this promise likewise would be conceptualized in terms of the employer’s implied promise to continue the checkoff for a year. Although the condition terminating the duty would be partially within the control of the promisor, this would not make the promise illusory. See E. FARNSWORTH, *CONTRACTS* 538 (1982) (a condition in a contract may be largely within the control of the obligor, the obligee, a third person, or the condition may be beyond anyone’s control). This conceptualization would have avoided the court’s correct observation that a promisor cannot renege on a promise by simply refusing to accept the consideration being given in return for the promise. Of course, all of this is putting contract law to a use for which it was not intended.

Because it was the Board itself that originally opened the Pandora's Box of contract analysis, one can hardly suppress a smirk when the court so rudely but correctly slammed the lid back down on the Board's fingers. In any event, having reviewed the rationale advanced by the Board and having found it to be wanting, the court declined to speculate about whether the same result might be reached under a different theory.²⁵⁶ Indeed, the court specifically negated the suggestion that the Board was necessarily bound by common law contract principles in dealing with checkoff revocability issues.²⁵⁷ The court thus left it open for the Board to devise an approach to the problem which is based upon federal labor policy rather than a specious and erroneous application of contract law.

The Board, however, declined the invitation. In *United States Postal Service (Huber)*,²⁵⁸ the Board adhered to its original position. The ALJ had dismissed the *Eagle Signal* line of cases as a mere "recent trend" which was inconsistent with congressional intent and ordinary contract principles which would have required the authorization to expressly provide for revocation upon resignation.²⁵⁹ The Board reversed the ALJ, relying solely on its prior decision in *Dalton*.²⁶⁰

The Sixth Circuit Court of Appeals denied enforcement of the Board's order on three grounds. First, the court ruled that the Board's equation of the Postal Reorganization Act's checkoff language with that of the NLRA

256. 827 F.2d at 555. The court noted, but declined to review, Member Johansen's theory that the checkoff remained unrevoked but that the amount due was zero. *Id.* See *supra* note 250 and accompanying text regarding Johansen's position.

257. *Id.* at 554. Judge Fletcher concurred with the result, but on the theory that the specific wording of section 1205 requires that checkoff authorizations in the Postal Service be irrevocable, while the wording of section 302(c)(4) is merely permissive with respect to irrevocability. *Id.* at 555-56 (Fletcher, J., concurring).

258. 280 N.L.R.B. 1439 (1986), *enforcement denied*, 833 F.2d 1195 (6th Cir. 1987).

259. *Id.* at 1445 (ALJ stated "absent an expression on the face of the checkoff authorization that dues deductions are to cease on termination of membership, the stated limitations on revocation prevail.") The ALJ concluded that because Congress expressly guaranteed the right to revoke under certain specific conditions, not including resignation of union membership, the implication is that the right of revocation does not exist in the latter situation. *Id.* at 1445 n.12. With respect to the quid pro quo or consideration analysis, the ALJ concluded that the use of those terms did not necessarily make the obligations mutually dependent—at least not in the sense of the employee having the power to resign from membership and thereby escape the obligation to continue the dues checkoff. The ALJ compared the resignation to a lease where rent is the quid pro quo for possession, but where a tenant cannot escape from the obligation of paying rent by unilaterally abandoning possession. *Id.* at 1446 n.13. The ALJ's contract analysis is superior to that of the Board's, but equally irrelevant to the proper resolution of the issue, which would address the problem from the perspective of federal labor policy rather than based upon an analogy to leasehold principles in landlord-tenant law.

260. 280 N.L.R.B. at 1439. See also National Ass'n of Letter Carriers, 283 N.L.R.B. 644 (1987) (union violated section 8(b)(1)(A) by refusing to honor members' resignations and revocations of checkoff authorizations, which had been executed in consideration of union membership).

was wrong as a matter of statutory interpretation.²⁶¹ Second, the court concluded that the two checkoff provisions should not be construed *in pari materia* because of the significant differences between labor relations in the Postal Service and the private sector.²⁶² Third, although the court's reasoning on these two points implicitly suggests that the Board's theory might be correct when applied in the purely private sector context, the court ultimately rejected the overall approach. The court stated that it agreed with the Ninth Circuit's decision in *Dalton*, holding that the Board had misapplied basic contract law principles by assuming that a resignation from membership automatically relieves the employee of the duty to continue the checkoff.²⁶³ The court, however, conceptualized the consideration (i.e. "the benefits of union membership") as flowing from the union, rather than from the employer²⁶⁴ (which was how the Ninth Circuit had oddly conceptualized it). Moreover, since the union remained ready to tender the benefits of membership, the employees could not unilaterally abrogate their promise to tender dues through a checkoff arrangement.

The General Counsel had argued that the Board's decision was supported by *Pattern Makers' League v. NLRB*,²⁶⁵ which held that a union cannot enforce a contractual limit on a member's right to resign. The court rejected the argument, stating that *Pattern Makers'* was predicated on a policy of "voluntary unionism" which was not at issue in *Huber* because the employees were free to leave the union without punishment.²⁶⁶ While that is true with respect to the resigning employee's avoidance of the disciplinary power of the union, the *Pattern Makers'* policy of voluntary unionism encompasses far more than that. Indeed, in both the Postal Service context and in right-

261. *Huber*, 833 F.2d at 1199. The court stated:

The language of the two laws is similar, but crucially different. Section 302(c)(4) of the NLRA provides that an authorization "shall not be irrevocable for a period of more than one year." . . . The provision allows, but does not require, an authorization to be irrevocable, and it places a maximum on the length of permissible irrevocability. The PRA, in contrast, provides that the Postal Service will deduct dues from the pay of employees who have made "a written assignment which *shall be irrevocable* for a period of not more than one year." . . . On its face, section 1205 requires that any assignment made must be irrevocable for a period up to a year.

Id. (emphasis added by court) (footnote omitted).

262. *Id.* In particular, the court noted that "[t]he prohibition of union security clauses in the Postal Service makes the irrevocability provision of section 1205 the only way the union can accurately predict its future income and the level of services it can provide." *Id.* This statement, however, tacitly recognizes that an irrevocable checkoff is the functional equivalent of the more traditional forms of union security. Contrary to the reasoning of the court, it would seem highly unlikely that Congress would prohibit something in one section and require it in another.

263. *Id.* at 1200.

264. *Id.* at 1200 & n.10.

265. 473 U.S. 95 (1985).

266. *Huber*, 833 F.2d at 1201.

to-work states, voluntary unionism connotes freedom from any compulsory support of the union, including mere “financial core” membership.²⁶⁷ It would thus be contrary to the spirit of *Pattern Makers*’ for that important statutory policy to be defeated by the mere fact that the employee has signed a checkoff authorization which purports to be irrevocable except at certain times.

The *Huber* court also noted, however, that even if the *Pattern Makers*’ argument had merit, the Board had not relied on it in reaching its decision and the court was disinclined to affirm the Board’s action on the basis of reasons not relied upon by the Board itself.²⁶⁸ Thus, this procedural point suggests that despite the court’s generally negative reaction to the *Pattern Makers*’ argument, the court might, nevertheless, be receptive to a Board decision that was based on considerations of federal labor policy rather than a misapplication of the common law of contracts. Certainly, to the extent that a checkoff authorization serves to perpetuate one of the incidents of formal union membership beyond the date an employee has exercised the statutory right to resign from that membership, the irrevocable checkoff is contrary to federal labor policy.

The Board may soon have the opportunity to adopt a *Pattern Maker*’s approach to the revocation question. In a case involving the Smithfield Packing Company, the Board’s Division of Advise recommended that the Regional Director issue a complaint when the employer continued to deduct union dues from certain employees who had resigned from the union and attempted to revoke their checkoff authorization.²⁶⁹ Since this occurred in a right-to-work state, the employees had no financial obligations to the union—other than that imposed by the checkoff authorization itself.²⁷⁰ The Board’s Division of Advise, however, was of the opinion that the employees’ promise to not revoke the checkoff authorization for a year was subordinate to their section 7 rights under *Pattern Makers*’:

In our view, the Section 7 rights of employees to resign necessarily encompasses the right to sever all ties to the union, at least in the absence of a union-security clause. The Section 7 right would be hollow indeed if the employee could be required to continue to lend financial support to the union from which he/she just resigned. In other words, a requirement that

267. 39 U.S.C. § 1209 (1982) (disallowing any form of compulsory union support). Section 1209(c) provides that: “[e]ach employee of the Postal Service shall have the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right.” *Id.* State right-to-work laws similarly prohibit employers and unions from imposing any membership or financial obligations on employees as a condition of employment. See T. HAGGARD, *supra* note 4, at 172-78.

268. *Huber*, 833 F.2d at 1201.

269. NLRB Adv. Mem. (Smithfield Packing Co.) (Nos. 5-CA-20106 & 5-CB-6180) (Mar. 6, 1989).

270. The irrevocable checkoff is a form of “compulsory unionism” that is beyond the power of the states to prohibit thru right-to-work laws. See *infra* text at Part IV.

the resignee continue to pay membership dues is inconsistent with the principle that an employee can resign membership at any time.²⁷¹

Although the Board has not yet had the opportunity to consider the *Smithfield Packing* theory, if Regional Directors continue to issue complaints on the basis of this Advice Memorandum, the issue will get to the Board and the courts eventually. Since the theory is based on sound considerations of federal labor policy and Supreme Court decisions, it is likely to be accepted.

F. Other Factors Effecting the Revocability of a Checkoff Authorization

1. Union Security Deauthorizations Elections

Under section 9(e)(1),²⁷² employees who are subject to a union security agreement may petition the Board for an election to determine whether the union's power to negotiate such a provision should be revoked. The Second Circuit dealt with the effect of a successful deauthorization election on the continued validity of checkoff authorizations in *NLRB v. Penn Cork & Closures, Inc.*²⁷³ The collective bargaining agreement initially contained both a union security provision and a checkoff provision. Many employees signed checkoff authorizations, which were subject to limited revocability. Subsequently, in a Board election, the employees rescinded the union security provision. Many of them also resigned from the union and attempted to revoke their checkoff authorizations. The company refused to honor the request on the grounds that it remained bound by the contract. The Board found the employer guilty of unfair labor practices, and the court agreed.²⁷⁴ The court's decision was based on two lines of analysis, one concerned with the presumed intent of the employees and the other with the policy of the statute.

271. NLRB Adv. Mem. *supra* note 269, at 2. The Division of Advice, alternatively, also adopted Member Johansen's position that once an employee exercises the right to resign from the union, that employee's dues obligation is zero, and that this is the amount that can be checked-off. *Id.* at 4-5.

272. 29 U.S.C. § 159(e)(1) (1982). The Taft-Hartley Act originally prohibited a union from negotiating any kind of union security agreement unless the employees specially authorized it in a Board-conducted election. 61 Stat. 136, 141, 144-45 (1947). See Whitney, *Union-Shop and Strike-Vote Elections: A Legislative Fallacy*, 2 INDUS. & LAB. REL. REV. 247 (1949). In 1951, Congress eliminated that requirement, but nevertheless made all union security agreements subject to a deauthorization election if 30% of the employees requested one. 65 Stat. 601-602 (1951). See generally Dworkin & Extejt, *The Union-Shop Deauthorization Poll: A New Look After 20 Years*, 102 MONTHLY LAB. REV. 36 (1979); Morgan, *The Union Shop Deauthorization Poll*, 12 INDUS. & LAB. REL. REV. 79 (1958). Current studies suggest that a union security deauthorization election is often a precursor to the decertification of the union as the collective bargaining representative. See Bain, Scott & Arnold, *Deauthorization Elections: An Early Warning Signal to Decertification?*, 39 LAB. L.J. 432 (1988).

273. 376 F.2d 52 (2d Cir.), cert. denied, 389 U.S. 843 (1967).

274. *Penn Cork*, 156 N.L.R.B. 411 (1956).

With respect to the intent analysis, the court agreed with the Board that when a union security provision exists, it is logical to infer that employees who authorize a checkoff do so for the purpose of complying with the provision's requirement concerning the payment of dues.²⁷⁵ The union security provision is, in other words, an implied condition of the employee's duty to continue the checkoff. Thus, when the union security provision is rescinded, the absence of "the procuring cause of checkoff authorizations"²⁷⁶ allows the employees to also revoke the authorization pursuant to the failure of the condition.

Additionally, the Board and the court also indicated that continued irrevocability of a checkoff authorization would conflict with the policy of free choice underlying section 9(e)(1). Deauthorization of the union security provision would most likely be motivated by the employees' desire to be free of the obligation to pay union dues, and if it did not achieve this end, rescission of the provision would not give employees a real choice.²⁷⁷ The policy argument is a compelling one, and should be applied whenever the statute allows an employee to be free from the requirements of compulsory union "membership," such as during contract hiatus periods.²⁷⁸

2. Requirements Later Imposed by the Collective Bargaining Agreement

The revocability of checkoff authorizations may also be effected by requirements imposed by collective bargaining agreements adopted after the authorizations have been executed. In *Cameron Iron Works, Inc.*,²⁷⁹ the checkoff authorization required the employee to give notice of revocation to the employer. The collective bargaining agreement was later revised to also require written notice to the union. The employer, at the union's insistence, refused to honor a revocation, the notice of which had not been sent to the union, and the Board ruled that both the employer and the union had committed unfair labor practices.²⁸⁰

275. *Penn Cork*, 376 F.2d at 56.

276. *Id.*

277. *Id.* at 55 (continued irrevocability "would undermine the freedom of election that Congress intended under § 9(e)(1), since rescission of the union security clause would be of little benefit if it did not provide relief from continued payment of union dues, very likely the principal reason workers would seek rescission"). See also *Bedford Can Mfg. Corp.*, 162 N.L.R.B. 1428 (1967) (employer violated section 8(a)(1) by continuing to deduct union dues and initiation fees after employees attempted to revoke checkoff authorizations following vote to deauthorize the checkoff).

278. In *Lowell Corrugated Container Corp.*, 177 N.L.R.B. 169, 173-74 (1969), *aff'd*, 431 F.2d 1196 (1st Cir. 1970), the ALJ read *Penn Cork* as applying equally to both authorization rescissions and contract expirations. Although that is certainly consistent with the theory of the case, there is no express language in the decision to that effect. The problems of contract hiatus are discussed in the context of section 302(c)(4), *supra* Part II-B, and of section 8, *supra* Part III-D.

279. 235 N.L.R.B. 287 (1978), *enforcement denied*, 591 F.2d 1 (5th Cir. 1979).

280. *Id.* at 289.

The Board found that the authorization was a contract between the employee and the employer, and that the Act required this contract to be in writing. Revocation requirements imposed by a later collective bargaining agreement deprive employees of the protection which the statutory requirement of a "written assignment" was designed to provide.²⁸¹ The Board also suggested that the imposition of new revocation requirements would undermine the one-year limit on irrevocability, since noncompliance would force the employee into another year of checkoff.²⁸² The Board, in other words, gave the terms of the checkoff authorization precedence over the terms of the collective bargaining agreement.²⁸³

The Fifth Circuit refused to enforce the Board's order.²⁸⁴ Without deciding whether the employer and union violated section 302, the court held that in any event there were no unfair labor practices. The court adopted the position of the ALJ that "an employer who has acted reasonably and in good faith in construing the dues checkoff authorization card and the collective bargaining agreement's provisions regarding revocation has not infringed upon an employee's exercise of Section 7 rights."²⁸⁵ More specifically, the court held that adherence to the terms of the collective bargaining agreement neither coerced nor discriminated against the employees.²⁸⁶ In any event, the

281. Section 302(c)(4), 29 U.S.C. § 186(c)(4). The Board stated:

Thus, if an employer and union are free to change the revocation procedure without the assent of the individual employee affected thereby, the terms of the written agreement by which the employee authorized dues deductions become meaningless, and the employee loses the protection intended by the requirement in Section 302(c)(4) of a 'written assignment.'

235 N.L.R.B. at 289.

282. *Id.*

283. Conversely, in *Furr's, Inc.*, 264 N.L.R.B. 554 (1982), the Board ignored the limitations on revocation that were contained in the checkoff authorization because the collective bargaining agreement, which provided for the checkoff arrangement but which was silent on revocation, also expressly stated that any individual term of employment that "conflicts" with the collective agreement was void. *Id.* at 555. Arbitrators had thus held that the limitations contained in the checkoff authorization were not binding and that the employer did not violate the collective bargaining agreement by honoring certain checkoff revocations. In a section 8(a)(5) unfair labor practice proceeding, the Board deferred to the arbitration decisions under the *Spielberg* doctrine. *Id.* at 557. See *infra* Part IV for a discussion of the NLRB's policy of deferring to arbitration.

284. 591 F.2d 1 (5th Cir. 1979).

285. *Id.* at 3. The court cited three Board cases in support of this proposition—none of which truly support it. In *American Smelting & Ref. Co.*, 200 N.L.R.B. 1004 (1972), the Board expressly declined to rely exclusively on the employer's reasonableness and good faith in construing the checkoff and contract. Rather, the Board held that the employer's action based on that construction was not an unfair labor practice. In *Miller Brewing Co.*, 193 N.L.R.B. 528 (1971), and *Morton Salt Co.*, 119 N.L.R.B. 1402 (1958), the Board was confronted with checkoff and contract provisions which it said were ambiguous; the Board stated that it did not want to get involved in a matter which was primarily a matter of contract interpretation. There was no ambiguity, however, involved in *Cameron Iron*.

286. *Cameron Iron*, 591 F.2d at 4. The conclusion with respect to coercion simply begs the question, since it assumes that individual assent to the terms of the collective bargaining

court essentially gave the terms of the collective bargaining agreement priority over the terms of the checkoff authorization.

The collective bargaining agreement, however, cannot impose procedural requirements which make revocation unduly burdensome. In *Felter v. Southern Pacific Co.*,²⁸⁷ the Supreme Court held that under the Railway Labor Act a union cannot insist that revocation be only on a form furnished by the union. In *Peninsula Shipbuilders' Association v. NLRB*,²⁸⁸ which arose under the Taft-Hartley Act, the collective bargaining agreement similarly required employees to use a special revocation form. The union apparently argued that *Felter* did not apply, due to differences in the wording of the two statutes. The court, however, found it unnecessary to decide whether the provision was invalid on its face under the *Felter* rationale. Rather, the court merely held that the provision *as enforced* clearly inhibited the employees' statutory right to revoke their checkoff authorizations.²⁸⁹

3. Termination of Employment

In *Industrial Towel and Uniform Service*,²⁹⁰ the Board held as a matter of law that the severing of the employment relationship also severs an employee's obligations under a checkoff authorization. Thus, if that employee is later rehired, the employer cannot resume checking off dues unless the employee signs a new authorization form. The test that the Board used in determining the "severance" issue was whether the employee had an intention of returning and a reasonable expectancy of reemployment at the

agreement is not required. The court's finding of no discrimination is likewise faulty, since it was expressly based on the notion that section 8(a)(3) is violated only when various employees are treated differently—which is *not* what encouragement of union membership "by discrimination" means under the statute. For example, in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Court held that an employer violated section 8(a)(3) for disciplining an employee who had violated a no-solicitation rule, even though the employer had argued that there was no "discrimination" because the rule was applied to all cases, not just those involving union solicitation.

287. 359 U.S. 326 (1959).

288. 663 F.2d 488 (4th Cir. 1981).

289. The Board had found that there was no easy access to the forms that the contract required employees to use, that employees had to go personally to the union hall, and that employees who wanted to revoke may have also been required to resign from the union. *Id.* at 493. For a more detailed report of the Board's findings, see *Newport News Shipbuilding & Dry Dock Co.*, 253 N.L.R.B. 721 (1980).

290. 195 N.L.R.B. 1121 (1972), *enforcement denied*, 473 F.2d 1258 (6th Cir. 1973) (*per curiam*). In this case, the employee had left the company's employment due to illness. Some three years later, she was reinstated in a position commensurate with her reduced physical abilities, but she did not complete a new employment application. *Id.* at 1121. The ALJ found that she was not rehired as a new employee and because she had not revoked her checkoff authorization, it had been automatically renewed. The Board disagreed with the ALJ's assessment of the facts, but the court of appeals held that the Board's position was not supported by substantial evidence. 473 F.2d 1258, 1261.

time.²⁹¹ In a later case,²⁹² the Board also held that an employee's motivation in quitting is irrelevant, even if that motivation is primarily to avoid the obligation imposed by the checkoff.²⁹³

G. Monetary Remedies

The usual remedy for an unfair labor practice, including those involving illegal checkoff arrangements, is a cease and desist order.²⁹⁴ In addition, the Board can impose monetary sanctions.²⁹⁵ If the employer has breached an agreement to checkoff union dues, the Board will normally require the employer to reimburse the union for the dues it would have received by this method but for the breach. Thus, the employer is liable only for the dues of employees who have signed authorization forms.²⁹⁶ Even with respect to these employees, the union may have a duty to mitigate its loss by attempting to collect the dues by other means.²⁹⁷ If the remedy also includes a backpay award to the employees, the employer may deduct the dues from those payments.²⁹⁸ Although there is no clear precedent on the point, it appears that the employer may also recoup the payment by deducting it later from the employees' paychecks,²⁹⁹ assuming of course that they are still employed.

291. 195 N.L.R.B. at 1121. The Board has also applied this test to situations where an employee is transferred out of the bargaining unit into a supervisory position, and then back into the bargaining unit. See *Cameron Iron Works, Inc.*, 272 N.L.R.B. 984 (1984).

292. *Brotherhood of Railway Clerks (Yellow Cab Co.)*, 205 N.L.R.B. 890 (1973), *enforced*, 498 F.2d 1105 (5th Cir. 1974).

293. *Id.* at 891. In this case, one employee went to work for a rival cab company during a strike. Although under the strike settlement agreement he was eligible to be rehired without loss of seniority if he applied in ten days, he waited until later to apply, apparently believing that this would relieve him of his checkoff obligations. *Id.* at 890. The Board found that regardless of the employee's motives in waiting, a severance in the employment relationship had occurred. *Id.* at 891. The Board similarly held that an employee who had been discharged for cause, but later rehired, was also relieved of his obligations under the checkoff authorization he had previously signed. *Id.* at 892.

294. 29 U.S.C. § 160(c) (1982).

295. See generally J. HUNSICKER, J. KANE & P. WALTHER, *NLRB REMEDIES FOR UNFAIR LABOR PRACTICES* 109-12 (rev. ed. 1986) (discussing various reimbursement remedies for illegally exacted union dues, fees and fines).

296. See, e.g., *Southland Dodge, Inc.*, 205 N.L.R.B. 276 n.1 (1973), *enforced without opinion*, 492 F.2d 1238 (4th Cir. 1974) (employer not liable for reimbursement of union for loss of dues resulting from employer's failure to sign collective bargaining agreement reached by the parties where employees had not signed checkoff authorizations).

297. See *Amoco Prod. Co.*, 233 N.L.R.B. 158 (1977) (where collection by alternative means would be difficult, union's failure to try did not constitute a waiver of the right to reimbursement).

298. See *Ogle Protection Serv., Inc.*, 183 N.L.R.B. 682 (1970), *enforced*, 444 F.2d 502 (6th Cir. 1971).

299. In *NLRB v. Shen-Mar Food Prod., Inc.*, 557 F.2d 396, 399 n.1 (4th Cir. 1977), the court observed that "[t]he [Board's] order does not address itself to the primary responsibility of the individual employees for such dues as between them and their employer." *Id.*

On the other hand, with respect to employees who have been coerced into signing or continuing a checkoff authorization despite attempts to revoke,³⁰⁰ the Board normally imposes joint and several liability on the employer and the union.³⁰¹ However, an employer will be only secondarily liable if it can show that it strongly resisted the union's unlawful practice or otherwise acted in good faith.³⁰² Finally, reimbursement will be denied altogether if the employees would have been required to pay the money to the union anyway, under a valid union security agreement.³⁰³

IV. NLRB DEFERENCE TO ARBITRATION

Though the Act regulates them, checkoff arrangements are also subject to the provisions of the collective bargaining agreement between the union and the employer. Most collective bargaining agreements provide for the resolution of contract disputes through a process of arbitration. Thus, an employer who refuses to checkoff dues when obligated to do so will be potentially subject to both arbitration and unfair labor practice proceedings.³⁰⁴ Where both types of proceedings are available, the Board has developed a policy of deferring to arbitration in certain circumstances to avoid multiple litigation. Those circumstances are spelled out in the *Collyer* doc-

300. On the authority of *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651 (1961), the Board will not order reimbursement to an employee unless it can be shown that the particular employee was actually coerced by the illegal conduct. *See, e.g., True Temper Corp.*, 217 N.L.R.B. 1120, 1124-25 (1975) (reimbursement for employees for dues illegally exacted by checkoff authorization required for individual to be considered for employment); *Raymond Buick, Inc.*, 182 N.L.R.B. 504, 504 (1970) (reimbursement only for employees who had been coerced); *Stainless Steel Prod., Inc.*, 157 N.L.R.B. 232, 233 (1966) (same).

301. *See, e.g., Brotherhood of Ry. Carmen, Lodge 365 v. NLRB*, 624 F.2d 819, 821-22 (8th Cir. 1980) (also limiting reimbursement to employees who could be reasonably contacted); *NLRB v. Hi-Temp, Inc.*, 503 F.2d 583, 586-87 (7th Cir. 1974) (employer and union jointly and severally liable for reimbursement of employees who had been coerced to contribute to minority union); *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352, 1357-58 (9th Cir. 1970) (employer and union liable to employees for initiation fees and dues where employees joined union after being told that contract required union membership).

302. *See NLRB v. Campbell Soup Co.*, 378 F.2d 259, 262 (9th Cir. 1967) (joint and several liability imposed for reimbursement of dues exacted from newly hired employees who were required to join union immediately as condition of employment, but if employer had resisted this practice it might have been only secondarily liable), *cert. denied*, 389 U.S. 900 (1967); *Hermet, Inc.*, 222 N.L.R.B. 29, 29 n.1 (1976) (joint and several liability imposed because employer did not strongly resist or act in good faith); *see also Kinney Nat'l Maint. Serv. v. NLRB*, 81 L.R.R.M. (BNA) 2733, 2733 (9th Cir. 1972) (court imposed reimbursement liability only on the union; "We do not believe the purposes of the act would be served by compelling the company to, in effect, pay the dues twice"). *But cf. Meijer, Inc. v. NLRB*, 564 F.2d 737, 744 (6th Cir. 1977) (rejecting employer "good faith" as a defense to a reimbursement order).

303. *Wickes Cos., Inc. (Mode O'Day Co. Div.)*, 290 N.L.R.B. No. 162, 129 L.R.R.M. (BNA) 1276 (Sept. 26, 1988); *American Geriatric Enters.*, 235 N.L.R.B. 1532 (1978); *Strafford's Restaurant, Inc.*, 182 N.L.R.B. 474 (1970).

304. An employer who checks off dues without any employee authorization will be guilty of an unfair labor practice, but it would be difficult to conceptualize that as a breach of contract.

trine,³⁰⁵ under which the Board will withhold its jurisdiction over an alleged unfair labor practice, even if none of the parties have invoked the arbitration process, if the contract and its meaning lie at the center of the dispute, the employer is willing to arbitrate, and the parties have a history of amicable relations.³⁰⁶ Under present policy, the Board will defer in advance to arbitration in cases involving interference with section 7 rights, discrimination, and bad faith bargaining.³⁰⁷ Furthermore, under the *Spielberg* doctrine,³⁰⁸ the Board will defer to the award which an arbitrator has rendered if the proceedings appear to have been fair and regular, all parties agreed to be bound, the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act,³⁰⁹ the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to the unfair labor practice.³¹⁰

The parameters and application of these doctrines are complex and controversial, particularly when the Board's policy of deferring to arbitration pertains to an alleged unfair labor practice involving a checkoff issue. The Board has recognized that checkoff procedure disputes primarily involve interpretation of the collective bargaining agreement.³¹¹ Accordingly, the Board has also recognized that arbitration is capable of resolving contract interpretation issues.³¹² The Board's actual practice, however, is rather at odds with these statements. Indeed, the unique nature of checkoff disputes renders them singularly inappropriate for resolution through arbitration in most cases.

The question of deferral could come up in several ways. In the typical checkoff controversy, the employee submits a revocation, the employer honors it, and the union objects on the grounds that it was not timely. The employer is then faced with the decision of either honoring the revocation or acquiescing in the union's demand that the checkoff be reinstated.

If the employer reinstates the checkoff, the employee could file charges alleging an employer violation of sections 8(a)(1), 8(a)(2), and 8(a)(3), and

305. The doctrine takes its name from *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), where it was first articulated.

306. *Id.* at 842. For a discussion of the *Collyer* doctrine, see R. GORMAN, *supra* note 4, at 752-61.

307. *United Technologies Corp.*, 268 N.L.R.B. 557 (1984).

308. The doctrine is named for the case where the Board first stated it, *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

309. *Id.* at 1082.

310. *Id.* See also *Olin Corp.*, 268 N.L.R.B. 573 (1984) (contractual issue factually parallel to unfair labor practice charge and arbitrator was presented with facts relevant to resolving unfair labor practice charge).

311. *Furr's, Inc.*, 264 N.L.R.B. 554, 556 (1982) ("it is well-established Board law that disputes about checkoff procedures essentially involve contract interpretations rather than interpretation and application of the Act")

312. *Id.* at 556 ("the Board has specifically recognized that such contract issues are fully capable of resolution through arbitration").

union violations of sections 8(b)(1)(A) and 8(b)(2).³¹³ The employer and union might then request that the Board defer to arbitration under the *Collyer* doctrine. It is highly unlikely, however, that the Board would defer under these circumstances. In the first place, it is doubtful that the employer's conduct could even be conceptualized in terms of a breach of the collective bargaining agreement. The employee's claim is founded on the absence of a contractual duty by the employer, not the breach of one. A breach on the union's part is even more difficult to imagine. Even if continuing to honor an authorization that the employee has revoked could somehow be fit into the contract breach format, under most collective bargaining agreements an individual employee cannot compel arbitration. The union is certainly not going to claim that the employer breached the contract by doing what the union insisted that it do. Finally, even if the employee could demand arbitration over the issue, it would be unconscionable for the Board to force the individual employee to bear that expense. In sum, in this context a *Collyer* deferral would constitute an indefensible abdication of the Board's statutory duty to adjudicate unfair labor practice charges.

Deferral is more likely to become an issue when the employer takes the alternative course and honors the revocation, in spite of the union's objections. Here, the union is faced with a decision between claiming a contract breach and demanding arbitration, or filing charges alleging an employer violation of sections 8(a)(5) and 8(d).³¹⁴ If the union elects to file unfair labor practice charges first, then the employer might argue for deferral under *Collyer*. On the other hand, if the union takes the matter to arbitration and the union's grievance is upheld, employer compliance with the award could still precipitate unfair labor practice charges by the employee—as discussed above. In regard to those charges, the employer or the union would then argue for post-arbitration deferral under *Spielberg*. Or, if the arbitrator upholds the employer's decision to honor the revocation, then the union could still file unfair labor practice charges, with the employer then raising the *Spielberg* issue.

However the issue arises, arbitration over an employer's decision to honor a checkoff revocation suffers from two serious problems: (1) insuring that the interests of the employees are adequately protected; and, (2) insuring that the issues are resolved by reference to federal labor policy rather than merely to the tenets of contract interpretation.

With respect to the first problem, the Board and the courts should not naively assume that the employer will always vigorously defend its decision to honor an employee's checkoff revocation. The employer's decision to honor the revocation may have been motivated more by fear of employee unfair labor practice charges than concern over the employee's rights. Indeed, an employer that is locked into an established bargaining relationship with

313. See *supra* notes 84-89.

314. See *supra* notes 100-103 and accompanying text (discussion on the duty to bargain).

a union may actually prefer that checkoff authorizations not be easily revoked, because revocation at other than clearly delineated times simply adds confusion and inconvenience from an administrative perspective. For this reason alone, a *Collyer* deferral would always be inappropriate in situations where the employer's discontinuance of the checkoff is a result of employee revocations, because the Board could not predict in advance the vigor and legal basis of the employer's defense of its position.³¹⁵

This was certainly the case in *NLRB v. Brotherhood of Railway Clerks (Yellow Cab Co.)*,³¹⁶ where at the union's insistence the employer resumed the checkoff of several employees who had a significant break in employment. The employees filed unfair labor charges against the union. The union maintained that under the collective bargaining agreement the employees had the right to resolve the issue in arbitration, and that the Board should defer under *Collyer*.³¹⁷ Even if the employees had that right in regard to grievances against the employer, it is unclear how they could have implicated the union as a "defendant" in an arbitration proceeding.³¹⁸ In any event, the Board

315. *E.g.*, *Norfolk, Portsmouth Wholesale Beer Distribs. Assoc.*, 196 N.L.R.B. 1150 (1972). In *Norfolk*, the employer unilaterally discontinued the checkoff following the expiration of the contract, even though at that time no employees had requested it. The union filed charges alleging that the employer had violated the duty to maintain the terms of the contracts under sections 8(a)(5) and 8(d). The Board deferred under *Collyer*. *Id.* at 1151. However, there was apparently no conflict between the employees and their union with respect to the continuation of the checkoff. On the other hand, even if there was a community of interests between the employees and their union on this issue, the status of a checkoff provision during a contract hiatus would still appear to be more of a statutory than a contract issue—thus making deferral inappropriate on that basis. This, indeed, was the position the Board took in *W.P. Ihrie & Sons*, 165 N.L.R.B. 167 (1967), where the employer unilaterally discontinued the checkoff following a successful union security deauthorization election. But because this was a pre-*Collyer* decision, its value as precedent may be somewhat limited. *See supra* Part III-D for the section 8 aspects of a contract hiatus.

316. 205 N.L.R.B. 890 (1973), *enforced*, 498 F.2d 1105 (5th Cir. 1974). *See supra* notes 289-90 (discussion of the issue of severance from employment).

317. *Yellow Cab Co.*, 205 N.L.R.B. 890, 899 n.19. Although it is possible that this particular collective bargaining agreement did authorize an individual employee to initiate the arbitration procedure without the approval of the union, such a provision would be highly unusual.

318. *E.g.*, *Shopmen's Local Union No. 539 (Zurn Indus., Inc.)*, 278 N.L.R.B. 149 (1986). In *Zurn Indus.*, the employees charged that the union committed unfair labor practices by continuing to bill the employer for dues despite the employees' resignation from the union and revocation of checkoff. With respect to the deferral argument, the ALJ noted:

In the case at hand the collective-bargaining agreement between the parties defines a "grievance" as "any dispute between the company and the Union or any employee." I do not, however, interpret this to include disputes between the Union and employees. Rather, the collective-bargaining agreement makes it very clear that grievances are intended to include disputes between the Company and the Union on the one hand, or between the Company and an employee on the other. . . . The collective-bargaining agreement describes no procedure for disputes between the Union and employees. . . . No provision is made for employees to initiate arbitration, even in the case of disputes with the Employer.

Id. at 152.

declined to defer under *Collyer* and the court of appeals affirmed. The court noted that "[t]he interests of the employees and the Union are in direct conflict in this case. The interests of Yellow Cab were not affected, and it could not be expected to undertake the protection of the employees."³¹⁹

Deferral to an arbitration award under *Spielberg* presents a slightly different situation. If the arbitrator has upheld the employer's decision to honor a checkoff revocation, then this would suggest that the employees' interests were adequately protected by the employer and that, from this perspective at least, deferral would be appropriate.³²⁰ On the other hand, if the employer is found to have breached the contract by honoring an employee's request to stop the checkoff and the employee then files unfair labor practice charges against the employer, the union, or both, then the propriety of a *Spielberg* deferral is more doubtful. In *United Steelworkers Local No. 7450 (Asarco, Inc.)*,³²¹ the Board refused to defer to an arbitration award under those very circumstances. The Board noted that the employee was not a party to the arbitration and did not participate in any way. Moreover, the Board concluded that neither the employer nor the union adequately represented this employee's interests. Rather, it found that the employer and the union had both advocated positions adverse to the employee's, because "the Union was seeking dues, and the Employer contended that if dues were owing, [the employee]—not the Employer—was liable to pay them."³²² A contrary result, however, was reached in *Associated Press*,³²³ where both the Board and the court concluded that the employee's interests were fully protected by the employer during arbitration.³²⁴

Even if the employer's defense in arbitration adequately protects the employees' interest under the contract, deferral is still inappropriate due to the role that labor law and policy *should* play in the resolution of checkoff issues. When a contract issue is itself totally dispositive of an unfair labor practice charge, then there is some justification for the Board's policy of deferral. That is rarely, if ever, the case with respect to the unfair labor practice charges that typically arise out of checkoff arrangements. Whether the employer has committed a section 8(a)(5) violation, on the one hand, or a section 8(a)(1) violation, on the other, often turns on the effect to be given an employee's attempted revocation of a checkoff authorization. As was discussed above, the power of an employee to revoke is determined only in part by the language of the authorization and the collective bargaining agreement. It is also determined, *or should be*, in large part by reference to the underlying purposes and policies of the Act—a principal one being that

319. *Yellow Cab*, 498 F.2d at 1109.

320. See *Furr's, Inc.*, 264 N.L.R.B. 554 (1982).

321. 246 N.L.R.B. 878 (1979).

322. *Id.* at 881.

323. 199 N.L.R.B. 1110 (1972), *enforced*, 492 F.2d 662 (D.C. Cir. 1974).

324. *Id.* at 1114. See also 492 F.2d at 662 n.1.

of employee free choice.³²⁵ Congress has given the power to deal with those matters to the Board, not to arbitrators.³²⁶

Whatever the reason, the Board usually does not defer in checkoff cases. In deciding whether to do so or not, however, the Board often performs at least as much analysis as it would if it were deciding the issue *de novo* on the merits.³²⁷ It would seem that the more efficient approach would be to treat checkoff issues as being presumptively inappropriate for deferral and then proceed to deal with the statutory issues directly.

V. STATE POWER TO REGULATE CHECKOFF ARRANGEMENTS UNDER SECTION 14(b)

Section 14(b) of the Taft-Hartley Act amendments to the National Labor Relations Act simply codified the power of the states to prohibit and otherwise regulate all forms of compulsory unionism, despite the legality of union security agreements under the federal statute.³²⁸ Section 14(b) has thus

325. Many arbitrators, of course, can deal with the statutory and labor policy issues as competently as the Board can. The deferral doctrine, however, occasionally allows some egregious mistakes to get by. The arbitration decision in a case involving Southwestern Bell Telephone Company is a good example of why the Board should resolve these issues itself. There, after the contract expired, a number of employees attempted to revoke their checkoff authorizations. See NLRB General Counsel Advice Memoranda, *Southwestern Bell Tel. Co.*, 120 L.R.R.M. (BNA) 1350 (1985). The employer honored the revocations, and the union took the matter to arbitration claiming a breach of contract. The statutory analog would have been an alleged violation of the employer's duty to bargain pursuant to sections 8(a)(5) and 8(d). The arbitrator upheld the grievance, on the basis of the Board's decision in *Frito Lay*, 243 N.L.R.B. 137 (1979). *Id.* at 1351. This decision, however, does not support that result. All *Frito Lay* held was that an employer does not violate the section 7 rights of employees if, during a contract hiatus, it *refuses* to honor the checkoff authorization of employees. The correct precedent should have been *Bethlehem Steel*, 136 N.L.R.B. 1500 (1962), *enforced sub nom.* *Industrial Union of Marine Workers*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964), where the Board held that an employer does not violate section 8(a)(5)—i.e., breach the contract—when it honors a checkoff revocation submitted during the contract hiatus period. By relying on the wrong precedent, the arbitrator reached a conclusion clearly inconsistent with Board law, and the decision should have been considered repugnant to the purposes and policies of the Act and not deferred to. Unfortunately, the Board never had the opportunity to address the issue, because the employees' charges against the union were dismissed by the General Counsel under *Spielberg*. See NLRB General Counsel Advice Memoranda, *Southwestern Bell Tele. Co.*, 120 L.R.R.M. 1350 (BNA) (1985).

326. Deferral to arbitration on issues involving the checkoff is, of course, only a part of the larger issue of deferral in any situation which involves an interpretation and application of the statute. See generally J. GETMAN & B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 208-13 (1988) (discussing role of the courts in adjusting relationship between arbitrators and the Board).

327. The Board reaches the merits when considering the question of whether the arbitrator's decision is "repugnant to the purposes and policies of the act." *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955). In addition, the Board also has to evaluate all the other deferral criteria.

328. 29 U.S.C. § 164(b) (1982) provides as follows:

Nothing in this subchapter shall be construed as authorizing the execution or

been construed as allowing the states to enact right-to-work laws which prohibit the closed shop,³²⁹ the union shop,³³⁰ the agency shop,³³¹ and maintenance of membership arrangements.³³²

Checkoff arrangements, however, are not covered by section 14(b) and cannot, therefore, be prohibited or regulated under state right-to-work laws. In *SeaPAK v. Industrial Employees, National Maritime Union*,³³³ the employer was bound by contract to deduct union dues from the wages "of those employees for whom it has valid and enforceable dues deduction authorizations."³³⁴ Although the checkoff authorization stated that it was irrevocable for the normal one-year periods, the Georgia right-to-work law provided that checkoff authorizations were revocable at will. When the employer honored the checkoff revocations of several employees, the union sought an injunction.

The federal district court granted the injunction. It construed section 302 as affirmatively permitting irrevocable authorization (for no longer than a year), and determined that the statute totally preempted state law. Section 14(b) was found to be inapplicable, since "Congress did not conceive that checkoff of dues for a limited time after an employee's revocation of authorization therefor [sic] would amount to compulsory union membership as interdicted by state 'Right-to-Work' laws."³³⁵

The *SeaPAK* decision was affirmed *per curiam* by the Fifth Circuit, which merely adopted as its own the opinion of the district court.³³⁶ The Fifth Circuit decision was, in turn, affirmed by the Supreme Court, but without the benefit of oral argument and again without any additional written opinion.³³⁷ Although it is undoubtedly controlling

application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Id.

329. See *Sheet Metal Workers v. Nichols*, 89 Ariz. 187, 360 P.2d 204 (1961). *Contra* *Wallis v. IBEW Local 405*, 252 N.W.2d 701 (Iowa 1977).

330. See 2 C. MORRIS, *THE DEVELOPING LABOR LAW* 1393 (2d ed. 1983).

331. See *Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn*, 373 U.S. 746, 752 (1963) ("agency shops within § 14(b)").

332. *Cf. Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1948) (state had authority to order employer to cease and desist from enforcing maintenance of membership provision which had not been ratified according to state statutory requisites).

333. 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd per curiam*, 423 F.2d 1229 (5th Cir. 1970), *aff'd per curiam*, 400 U.S. 985 (1971). See also *International Bhd. of Operative Potters v. Tell City Chair Co.*, 295 F. Supp. 961, 965 (S.D. Ind. 1968) (federal preemption based on section 302 and Board authority under section 8 (citing *Penn Cork and Closures, Inc.*, 376 F.2d 52 (2d Cir.), *cert. denied*, 389 U.S. 843 (1967))).

334. 300 F. Supp. at 1197.

335. 300 F. Supp. at 1200-01.

336. 423 F.2d 1229 (5th Cir. 1970), *aff'd per curiam*, 400 U.S. 985 (1971).

337. Justice Harlan was of the view that the case should have been given more careful consideration. 400 U.S. at 985 (Harlan, J., concurring).

authority,³³⁸ the *SeaPAK* decision is wrong. It misconstrues the scope of section 14(b) and the meaning of the term "membership" in federal labor law. Its practical consequence is to provide immunity to the functional equivalent of a form of union security that section 14(b) clearly does prohibit. Moreover, it is inconsistent with the legislative history.

One of the stated premises of the district court's argument was that in section 302(c)(4) Congress intended to provide comprehensive and thus preemptive regulation of checkoff arrangements. That premise simply will not withstand analysis. The purpose of section 302(c) was to address the problems of extortion and racketeering.³³⁹ It did this by generally prohibiting payments by employers to labor unions. Having thus painted the prohibition with a broad brush, Congress then found it necessary to identify the exceptions—one of which just happened to be checkoff arrangements. Congress' primary intent, however, was not to regulate the checkoff, either comprehensively or preclusively. It did no more than say that certain kinds of checkoff arrangements are *not* illegal under the main language of the section. Thus, the Board and the courts have consistently recognized that section 302(c)(4) does not limit the power of the Board to further regulate the checkoff under section 8.³⁴⁰ It similarly follows that section 302(c)(4) should not be construed as a limitation on the scope of authority granted to the states in section 14(b).³⁴¹

The second prong of the district court's argument was that the "checkoff of dues for a limited time after an employee's revocation of authorization"

338. See, e.g., *United Electrical Workers v. Westinghouse Corp.*, 345 F. Supp. 274, 276 (W.D. Pa. 1972) (construing *SeaPAK* as applying to employees who sought to revoke incident to resignation and therefore case was "squarely controlling").

339. See *Schwartz v. Associated Musicians, Local 802*, 340 F.2d 228, 233-34 (2d Cir. 1964) (purpose of section 302 to protect union welfare funds and to prevent bribery, extortion and abuse of union office).

340. See, e.g., *NLRB v. Brotherhood of Ry. Clerks*, 498 F.2d 1105 (5th Cir. 1974) (legality under section 302 not determinative of section 8 issue); *Newport News Shipbuilding & Dry Dock Co.*, 253 N.L.R.B. 721, 726 (1980) (federal courts have jurisdiction to enforce section 302 through criminal penalties, but section 8, enforced by the Board, also protects employees), *aff'd*, 663 F.2d 488 (4th Cir. 1981). For a discussion of the doctrine which gives the Board "primary jurisdiction" over unfair labor practice issues, see R. GORMAN, *supra* note 4 at 766-86.

341. In the court's original opinion in *International Bhd. of Operative Potters v. Tell City Chair Co.*, 70 L.R.R.M. (BNA) 2790 (S.D. Ind.), *opinion withdrawn*, 295 F. Supp. 961 (S.D. Ind. 1968), the court correctly stated that "[t]he one-year proviso . . . is merely a part of a qualification of an exception to a general policy against employers paying money to unions. Its existence is not a sufficient reason to pre-empt the State of Indiana from regulating union check-offs." *Id.* at 2791. See also Note, *State Labor Laws in the National Field*, 61 HARV. L. REV. 840, 847 (1948):

Another form of union security device permitted by the Taft-Hartley Act is the check-off, which is declared to be legitimate if the individual employee authorizes the deduction. Although the Act does not expressly authorize state regulation, there seems little doubt as to the validity of state statutes prohibiting the check-off or further regulating its use.

Id.

does not amount to the kind of compulsory union membership that can be prohibited under section 14(b).³⁴² Section 14(b), rather, merely “leaves unimpaired the right of any state to prohibit union or closed shops.”³⁴³ The court’s mistake was to assume that the reach of section 14(b) is limited to forms of union security which purport to require formal or actual union membership as a condition of employment. The employer’s counsel correctly argued that this limitation on section 14(b) was inconsistent with the Supreme Court’s decisions in *NLRB v. General Motors Corp.*³⁴⁴ and *Retail Clerks International Association Local 1625 v. Schermerhorn*.³⁴⁵ Those cases held that an “obligation to pay initiation fees and regular dues” to the union was “the ‘practical equivalent’ of an ‘agreement requiring membership in a labor organization as a condition of employment’,”³⁴⁶ and therefore that so-called “agency shops” were encompassed by both the proviso to section 8(a)(3) and by section 14(b). Because a dues checkoff authorization which is irrevocable for a fixed period is literally an obligation to pay money to the union and is an incident of the employment relationship, it too is the practical equivalent of what section 8(a)(3) allows and section 14(b) permits the states to prohibit.

Indeed, as a practical matter, an irrevocable checkoff is no different than a form of union security known as “maintenance of membership,” which merely requires an employee who already is or who becomes a member of the union to remain a member for the remainder of the contract.³⁴⁷ Because the “membership” which a maintenance-of-membership agreement can require is limited to an obligation to pay fees and dues to the union (in contrast to true or literal membership), it is readily apparent that there is no essential difference between an irrevocable checkoff and a maintenance-of-membership agreement.³⁴⁸ It is thus an anomaly to construe section 14(b) as allowing the states to prohibit one but not the other.

Finally, there is legislative history to suggest that the decision in *SeaPAK* was wrong. In 1959, the Kennedy-Ervin bill proposed certain amendments to the Taft-Hartley Act.³⁴⁹ Specifically, the Senate version of what was to become the Labor Management Reporting and Disclosure Act³⁵⁰ modified section 302(c)(4) to exempt from the general prohibitions of the section

342. *SeaPAK*, 300 F. Supp. at 1200-01 (footnotes omitted).

343. *Id.* at 1201.

344. 373 U.S. 734 (1963).

345. 373 U.S. 746 (1963).

346. *Id.* at 751 (citing *General Motors*, 373 U.S. at 743).

347. A maintenance of membership clause requires an employee who becomes a member to remain one. See T. HAGGARD, *supra* note 4, at 4.

348. See *supra* note 8 and accompanying text.

349. S. 505, 86th Cong., 1st Sess. (1959), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 29, 52 [hereinafter LEGIS. HIST. LMRDA].

350. LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified primarily at 29 U.S.C. §§ 401-531 (1982)).

"money deducted from the wages of employees in payment of membership dues in *or other periodic payments to a labor organization in lieu thereof*."³⁵¹ Senator Goldwater's statement of opposition to this amendment was based on its tacit approval of agency shops, which were lawful under the Taft-Hartley Act but nevertheless subject to state proscription.³⁵²

Although the Senate passed the bill in that form, Senator Goldwater repeated his objections to the House Committee on Education and Labor.³⁵³ The House apparently agreed with the Senator, and the amendments it passed did not contain the "other periodic payments . . . in lieu" of membership dues language of the Senate bill. The Conference Committee likewise adopted the House language, and the statute was ultimately passed in that form.³⁵⁴

The implications of Senator Goldwater's position are clear. Under his interpretation of the Senate version of the bill, the checkoff exception to the prohibitions of section 302 would have precluded the states from prohibiting irrevocable checkoff authorizations.³⁵⁵ By *not* accepting the Senate version, so construed, Congress apparently intended to continue to allow the states to prohibit irrevocable checkoff authorizations despite the fact that they are permitted under section 302(c)(4).³⁵⁶ The Supreme Court gave inadequate attention to this question in *SeaPAK*, which demonstrably was decided incorrectly and which is therefore ripe for reversal.

351. SEN. REP. NO. 187, 86th Cong., 1st Sess. 68 (1959), *reprinted in* LEGIS. HIST. LMRDA, *supra* note 349, at 397, 464 (emphasis in original).

352. Senator Goldwater stated:

The bill permits the checkoff of fees paid in lieu of dues to a labor union. This tacitly recognizes that the so-called agency shop is lawful. The agency shop is a device now being used in an attempt to circumvent the right-to-work laws in several States, by requiring a periodic payment to the union for its services as collective bargaining agent without requiring the employee to join the union. Its effect, in practical terms, is exactly equivalent to what is now permitted by way of union security under [the] Taft-Hartley [Act], but which it was the intention of Congress to permit the States to prohibit.

105 CONG. REC. 6848 (daily ed. May 7, 1959) (statement of Sen. Goldwater), *reprinted in* 2 LEGIS. HIST. LMRDA, *supra* note 349, at 1271.

353. *Hearings on H.R. 3540, H.R. 3302, H.R. 4473, H.R. 4474, Before the Joint Subcomm. of the House Comm. on Education and Labor, 86th Cong., 1st Sess., (1959)* (statement of Sen. Goldwater).

354. H. REP. NO. 1147, 86th Cong., 1st Sess. (1959), *reprinted in* 1 LEGIS. HIST. LMRDA, *supra* note 349, at 934.

355. Senator Goldwater was clearly operating from that premise, and that is all that is important for the purposes of this discussion. Whether it was a correct interpretation of the amendment is another matter. Arguably it was not, for if the section 302(c)(4) mention of "periodic payments" in lieu of membership dues prevents the states from prohibiting these payments, then by the same token the mention of "membership dues" alone would also prevent the states from prohibiting these payments as a condition of employment—a position which Senator Goldwater surely did not subscribe to.

356. *See Amalgamated Ass'n of Street Employees, Div. 1225 v. Las Vegas-Tonopah-Reno Stage Line, Inc.*, 202 F. Supp. 726, 732-35 (D. Nev. 1962).

On the other hand, the *SeaPAK* issue will become more or less moot if the Board and the courts adopt the approach recommended by the Advice Division in *Smithfield Packing*.³⁵⁷ Since under that approach an employee will be entitled as a matter of federal law to revoke a checkoff authorization upon resignation from the union, it would be unnecessary for an employee to attempt to rely on a state right-to-work law making checkoffs revocable at will. The only effect, thus, that an overruling of *SeaPAK* would have would be to allow that employee to pursue the state remedies rather than file unfair labor practice charges. That alone, however, may be of sufficient importance to warrant a reexamination of this clearly erroneous decision.

VI. CONCLUSION

Many of the issues involving checkoff arrangements could be more easily resolved, if not eliminated altogether, if the Board and the courts began with the proposition that the checkoff is merely another form of union security. Thus, an employer's obligations with respect to checkoff arrangements should be no broader than they are with respect to other forms of union security, and the entire law in this area should be construed as a coherent whole. The corollaries of this would be as follows:

First, the mandatory duty to bargain over the checkoff should be limited by the proviso to section 8(a)(3), which, as construed by the Supreme Court in *Communications Workers v. Beck*,³⁵⁸ only authorizes a service fee rather than full membership dues. Thus, a union would be able to compel bargaining over a checkoff of that limited amount, but no more.

Second, if an employer wants to agree to deduct full membership dues from union members who authorize it, the employer should be free to do so. This option, however, would merely be a permissive subject of bargaining. And neither the collective bargaining agreement nor the individual checkoff authorizations should be construed as applying to full membership dues unless that is clearly and unequivocally stated in both the agreement and the authorization.

Third, if a checkoff authorization does encompass full membership dues, then the employee's continued membership should be construed as a condition of the authorization. In order to make the right of resignation recognized in *Pattern Makers' League v. NLRB* meaningful, it should include the power to also immediately revoke a checkoff authorization—either totally, or at least with respect to that portion over and above what is required of the employee under the union security agreement, if there is one.

Fourth, this approach to the checkoff would make it clear beyond cavil that the employer's section 8(a)(5) *duty* to honor a checkoff authorization and its section 8(a)(1) *privilege* of continuing to honor the checkoff in the face of an attempted revocation are *both* dependent on the existence of a

357. See *supra* text accompanying notes 269-71.

358. 487 U.S. 735 (1988).

valid contract authorizing the checkoff arrangement. This should be as a matter of statutory law, rather than contract interpretation. That is, because the checkoff is just another form of union security, the employees' statutory right to be free of compulsory unionism obligations during a contract hiatus should prevail over the employer's asserted privilege of continuing to honor a checkoff authorization which purports to be irrevocable except at designated periods.

Fifth, since the checkoff involves a limited form of compulsory unionism, the states should have the power to prohibit or regulate them under section 14(b). This, of course, would require a reversal of the Supreme Court's ill-advised decision in *SeaPAK v. Industrial Employees, National Maritime Union*.³⁵⁹

Sixth, section 302(c)(4) is a cumbersome anomaly. It is the case of an exceptional tail wagging the statutory dog. Checkoff arrangements ought to be regulated primarily under section 8. If an express checkoff exception is necessary to the general section 302(c) prohibition against the payment of money by an employer to a union, it should be worded simply in terms of checkoff arrangements which are not otherwise illegal under section 8. This, of course, would require congressional action.

In any event, if the Board, the Supreme Court, and Congress honestly recognized the checkoff for what it really is—i.e., a type of union security device—and interpreted the Act as it effects checkoff arrangements from that policy perspective, then the law in this area might begin to make some sense. Until then, it is destined to be a source of constant confusion.

359. 423 F.2d 1229 (5th Cir. 1970) (per curiam), *aff'd per curiam*, 400 U.S. 985 (1971).